

N. 3008

No. 15125

United States
Court of Appeals
for the Ninth Circuit

HARVEY L. WELLS and HARRY J. ALBERT-
SEN, on behalf of themselves, and others simi-
larly situated, Appellants,
vs.

J. C. PENNEY COMPANY, a corporation, and
THE CHASE MANHATTAN BANK, a cor-
poration, successor in interest to the Chase
National Bank of the City of New York,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

JUL - 3 1956

PAUL P. O'BRIEN, CLERK

No. 15125

United States
Court of Appeals
for the Ninth Circuit

HARVEY L. WELLS and HARRY J. ALBERT-
SEN, on behalf of themselves, and others simi-
larly situated, Appellants,

vs.

J. C. PENNEY COMPANY, a corporation, and
THE CHASE MANHATTAN BANK, a cor-
poration, successor in interest to the Chase
National Bank of the City of New York,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer of J. C. Penney Company.....	79
Answer of The Chase National Bank of the City of New York.....	75
Appeal:	
Bond on	257
Certificate of Clerk to Transcript of Record on	260
Counter Designation on (USCA).....	403
Designation of Record on (USCA).....	402
Notice of	256
Order Transmitting Exhibits on.....	259
Statement of Points on (USCA).....	399
Bond on Appeal.....	257
Certificate of Clerk to Transcript of Record....	260
Complaint	3
Exhibit X—Profit-Sharing Retirement Plan	14
Exhibit A—Agreement of Trust.....	41

ii.

Counter Designation of Record on Appeal (USCA)	403
Designation of Record on Appeal (USCA)....	402
Final Judgment	254
Findings of Fact and Conclusions of Law.....	215
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	256
Opinion	211
Order of Substitution.....	214
Order Transmitting Original Exhibits.....	259
Pre-Trial Order	86
Statement of Points Relied Upon (USCA)....	399
Transcript of Proceedings and Testimony.....	261

Witnesses:

Albertsen, Harry J.

—direct	317
—cross	319
—redirect	320

Campbell, Ora Estle

—direct	352
—cross	353
—By the Court.....	354

iii.

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Evans, Walter H., Jr.

—direct 335

Herbert, John I. H. (Deposition)

—Excerpts 273

Hughes, Mr. (Burkitt Case)

—Excerpt 348

Hughes, Albert W. (Deposition)

—Excerpts 294

Hughes, Albert W.

—direct 354

—cross 370

Jaureguy, Nicholas

—direct 330

Jenkins, John S.

—direct 303

—cross 306

King, Ralph H.

—direct 326

Mitchell, Robert H.

—direct 336

—cross 339

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Raskopf, A. J. (Deposition)

—Excerpts 265

Schwamb, Herbert H. (Deposition)

—Excerpts 271

Strayer, Manley B.

—direct 334

Talbot, John C.

—direct 350

—cross 352

Tonkon, Moe M.

—direct 334

Weiderman, R. C. (Deposition)

—Excerpts 275

Wells, Harvey L.

—direct 308

—cross 310

—redirect 316

—recross 317

NAMES AND ADDRESSES OF ATTORNEYS

KING, MILLER, ANDERSON,
NASH & YERKE,

RALPH H. KING,

FREDRIC A. YERKE, JR.

PAUL R. MEYER,

926 American Bank Building,
Portland 5, Oregon

For Appellants.

CLARENCE J. YOUNG,

WAYNE HILLIARD,

800 Pacific Building,
Portland 4, Oregon

For Appellees.

W. H. DANNAT PELL

HENRY STONE

C. ROBERT ROLL

522 Fifth Avenue
New York 36, New York

Attorneys for Appellee,
J. C. Penney Co.

In the United States District Court
for the District of Oregon

Civil No. 6095

HARVEY L. WELLS and HARRY J. ALBERT-
SEN, on behalf of themselves and others sim-
ilarly situated,

Plaintiffs,

vs.

J. C. PENNEY COMPANY, a corporation, and
THE CHASE NATIONAL BANK OF THE
CITY OF NEW YORK, a national banking
Association, Defendants.

COMPLAINT

Plaintiffs allege:

1. Plaintiffs bring this action on behalf of themselves and all other former management staff employees of J. C. Penney Company and of any wholly owned subsidiary of J. C. Penney Company who at any time became participants under the Profit-Sharing Retirement Plan for J. C. Penney Company management staff established in 1940 and who did not attain retirement status thereunder, and the heirs and legal representatives of any such management staff employees who died prior to reaching retirement status or prior to the institution of this action. Said former management staff employees of J. C. Penney Company number in

excess of five hundred, and it is therefore impracticable to bring them before the Court.

2. Plaintiff Harvey L. Wells is a citizen and resident of the State of Oregon. Plaintiff Harry J. Albertsen is a citizen and resident of the State of California. Defendant J. C. Penney Company is a corporation incorporated under the laws of the State of Delaware. Defendant The Chase National Bank of the City of New York is a national banking association organized under the laws of the United States of America, having its office and principal place of business in the City of New York, State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

3. Plaintiff Harvey L. Wells was born on the 24th day of September, 1896. Plaintiff Harry J. Albertsen was born on April 6, 1896.

4. During the year 1939 and thereafter until the year 1944 the plaintiff Harvey L. Wells was the manager of the store of the defendant J. C. Penney Company at Streator, Illinois. In 1944 the plaintiff Harvey L. Wells became the manager of the store of defendant J. C. Penney Company at Corvallis, Oregon, and continued as such manager until and including August 31, 1948. Plaintiff Harvey L. Wells submitted his resignation as manager of the Corvallis store on or about August 13, 1948.

5. Plaintiff Harry J. Albertsen during the year 1939 and up until December 31, 1950, was the manager of the store of the defendant J. C. Penney

Company located at 4713 Whittier Boulevard, Los Angeles, California. On or about the 20th day of November, 1950, the defendant J. C. Penney Company discharged the plaintiff Harry J. Albertsen as manager of said store, effective as of December 31, 1950.

6. On or about July 1, 1940, the defendant J. C. Penney Company adopted and issued to the members of its management staff hereinbefore-mentioned a profit-sharing retirement plan, a true copy of which is hereto annexed, marked "Exhibit X" and made a part hereof. At or about the time of the issuance of said plan the defendant J. C. Penney Company entered into an agreement of trust with the defendant The Chase National Bank of the City of New York, a true copy of which is attached marked "Exhibit A" and made a part hereof and which is also "Exhibit" A to said plan heretofore marked "Exhibit X" as annexed hereto.

7. At the time the defendant J. C. Penney Company adopted and issued to the members of its management staff the aforesaid profit-sharing retirement plan, its management staff included in excess of 1,800 persons. Said plan so adopted and issued by the defendant J. C. Penney Company was an inducement to each of the plaintiffs and to the other members of the management staff, including the former members of the management staff for whom plaintiffs bring this action, to continue in the employment of said defendant J. C. Penney Company. Plaintiffs and the other former members of

the management staff of J. C. Penney Company for whom the plaintiffs bring this action, in reliance upon said plan and the provisions thereof, continued in the employment of the defendant J. C. Penney Company for a number of years, until the employment of the plaintiffs was terminated as hereinbefore alleged, and the employment of the other former members of the management staff of J. C. Penney Company for whom the plaintiffs bring this action was terminated either by resignation, death or disability, or by reason of their discharge by the defendant J. C. Penney Company.

8. During the time the plaintiff Harvey L. Wells continued as a manager of the store of the defendant J. C. Penney Company, plaintiff Harvey L. Wells made contributions under the aforesaid profit-sharing retirement plan from his earnings for the following years in the following amounts:

1939.....	\$ 1,989.23
1940.....	929.83
1941.....	2,918.61
1942.....	1,797.71
1943.....	1,403.40
1944.....	1,371.73
1945.....	843.65
1946.....	1,293.97
1947.....	1,381.57

Total: \$13,929.70

That all of the aforesaid contributions were paid over to the defendant The Chase National Bank of

the City of New York at the time each contribution was made.

9. During the time the plaintiff Harry J. Albertsen continued as a manager of the store of the defendant J. C. Penney Company, plaintiff Harry J. Albertsen made contributions under the aforesaid profit-sharing retirement plan from his earnings for the following years in the following amounts:

1940.....	\$ 2,233.64
1941.....	4,772.85
1942.....	3,728.56
1943.....	2,959.61
1944.....	3,017.85
1945.....	2,659.52
1946.....	2,483.22
1947.....	1,857.04
1948.....	2,037.01
1949.....	2,107.61

Total: \$27,856.91

That all of the aforesaid contributions were paid over to the defendant The Chase National Bank of the City of New York at the time each contribution was made.

10. During the years that the former members of the management staff of J. C. Penney Company for whom plaintiffs bring this action were participants under the aforementioned profit-sharing retirement plan, each thereof made contributions from his earnings for each year, and the amounts of said

contributions were at the time thereof paid over to the defendant The Chase National Bank of the City of New York, as trustee under said plan.

11. On or about the first day of August, 1940, the defendant J. C. Penney Company sold to the defendant The Chase National Bank of the City of New York as trustee under the aforementioned agreement of trust, "Exhibit A" to "Exhibit X" hereto annexed, 200,000 shares of the capital stock of the defendant J. C. Penney Company at and for the agreed price of \$6,000,000. All of the funds to purchase said stock were obtained by the defendant The Chase National Bank of the City of New York under and by reason of a loan procured from the Continental Illinois National Bank and Trust Company of Chicago in the sum of \$5,700,000 and from funds paid over to said The Chase National Bank of the City of New York as trustee by the participants under the aforementioned plan.

12. On or about the 16th day of January, 1946, the defendant J. C. Penney Company declared a stock dividend of two shares of its common stock for each share of common stock then outstanding, and by reason of said stock dividend the number of shares dealt with in said plan has been multiplied by three in all instances, and said defendant The Chase National Bank of the City of New York held as trustee under said plan a total of 600,000 shares of said common stock of the defendant J. C. Penney Company.

13. By reason of their continuance in said em-

ployment of the defendant J. C. Penney Company, plaintiffs and the other participants under said plan thereafter became entitled to additional payments into said fund by the defendant J. C. Penney Company, and all of said payments, when and as made by the defendant J. C. Penney Company, became and remained the property of the plaintiffs and the other participants in said plan at the time said payments were made.

14. By reason of the facts herein alleged, the plaintiff Harvey L. Wells upon the termination of his employment with the defendant J. C. Penney Company became entitled to in excess of 250 shares of the capital stock of J. C. Penney Company held by the defendant The Chase National Bank of the City of New York as trustee under the aforementioned plan, and said stock has a present value in excess of \$16,750. The plaintiff Harvey L. Wells also became entitled to all the dividends accruing upon said shares of stock from the time of the termination of his employment by the defendant J. C. Penney Company, and the amount of said dividends exceeds the sum of \$2,000.

15. By reason of the facts herein alleged, the plaintiff Harry J. Albertsen upon the termination of his employment with the defendant J. C. Penney Company became entitled to in excess of 500 shares of the capital stock of J. C. Penney Company held by the defendant The Chase National Bank of the City of New York as trustee under the aforementioned plan, and said stock has a present value in excess of \$33,500.

16. By reason of the facts herein alleged, each of the former members of the management employment staff of the defendant J. C. Penney Company for whom the plaintiffs bring this action at the time of termination of his or her employment became entitled to a number of shares of the stock held by the defendant The Chase National Bank of the City of New York as trustee under said plan in the proportion that the contributions and earnings of each bore to the total contributions and earnings which were used for the acquisition of said stock and became entitled to dividends accruing upon said shares of stock thereafter.

17. By reason of remaining in the employment of the defendant J. C. Penney Company, in reliance upon the provisions of the aforementioned profit-sharing retirement plan, each of the plaintiffs and each of the former members of the management staff of the defendant J. C. Penney Company for whom this action is prosecuted earned in each year in which they continued in such employment the sums contributed and to be contributed by the defendant J. C. Penney Company under the terms and provisions of said profit-sharing retirement plan.

18. Although the defendant J. C. Penney Company provided no funds for the acquisition by the trustee of the aforementioned shares of stock of J. C. Penney Company other than such sums as were earned each year by the members of its management staff through their continued employment, and

although all sums used for the acquisition of said shares of stock by the trustee and for the liquidation of the loan procured by the trustee in purchasing said stock were supplied by the members of its management staff, the defendant J. C. Penney Company provided in said plan that the members of its management staff, the defendant J. C. Penney continued employment and contributions and earnings paid over to the trustee, should be awarded allotments from such stock only upon the chance of their survival and good health until retirement age and upon the chance of their continuance in the employment of J. C. Penney Company up to the time of such retirement; and further provided in said plan that said allocations of stock should be increased percentage-wise by the reason of the death of other members of the management staff or their resignation or their discharge from their employment. As so constituted, said plan was and is a wagering contract, and lottery, and contrary to public policy and contrary to the public policy of the State of New York.

19. The profit-sharing retirement plan and agreement of trust annexed hereto and marked "Exhibit X," so far as the same purported to set up a trust with respect to the shares of the capital stock of J. C. Penney Company, is void and of no effect, and said shares of stock were and now are held by the defendant The Chase National Bank of the City of New York as the trustee of a resulting trust in favor of the plaintiffs and the other former

members of the management staff of the defendant J. C. Penney Company and present members of its management staff in proportion to their contributions and earnings made under said plan and which were used in the acquisition of said shares of capital stock of J. C. Penney Company.

20. Plaintiffs are advised and therefore allege that the defendant The Chase National Bank of the City of New York has from time to time at the direction of the defendant J. C. Penney Company made deliveries of stock from the shares held in trust by it to persons asserted to have acquired retirement status under the aforementioned plan. Plaintiffs are advised and allege that the defendant The Chase National Bank of the City of New York still has in its possession in excess of 500,000 shares of the present capital stock of J. C. Penney Company, of a value in excess of \$33,000,000.

21. The rights of the plaintiffs to shares of stock held under the aforementioned trust agreement and the rights of all former members of the management staff of J. C. Penney Company to shares of stock held under said trust agreement present common questions of law.

Wherefore, Plaintiffs pray for relief and judgment as follows:

1. Adjudging and decreeing that the trust purported to be established under the profit-sharing retirement plan and agreement of trust, so far as it pertains to the shares of capital stock of J. C.

Penney Company, was and is illegal and void and of no effect.

2. Adjudging and decreeing that the defendant The Chase National Bank of the City of New York holds the shares of stock of J. C. Penney Company now in its possession as trustee for the plaintiffs and the former members of the management staff of J. C. Penney Company and the present members of its management staff as the beneficiaries of the resulting trust in proportion to their contributions and earnings contributed in the acquisition of said shares of stock.

3. Requiring the defendant The Chase National Bank of the City of New York to render an accounting of all of its transactions in connection with the acquisition of said shares of stock, all dividends received thereon, any distributions and deliveries thereof, and all of the contributions and earnings received by it in connection with the acquisition thereof.

4. Adjudging and decreeing what proportion of the shares of the stock of the J. C. Penney Company were acquired by the contributions and earnings of the plaintiffs and the former members of the management staff of J. C. Penney Company, and directing the delivery to each of the plaintiffs and to each of the former members of the management staff of J. C. Penney Company of the number of shares which the contributions of each bears to the total thereof.

5. Awarding to plaintiffs compensation for the

reasonable value of the services of their attorneys and counsel in the prosecution of this action, and reimbursement of their costs and expenses incurred herein, and decreeing that the sums so awarded shall be and constitute a lien upon all of the shares of stock held by the defendant The Chase National Bank of the City of New York for the plaintiffs and the former members of the management staff of J. C. Penney Company and for any and all other persons participating in said fund.

6. For such other and further relief as to the Court shall seem equitable and just in the premises.

/s/ KING, WOOD, MILLER,
ANDERSON & NASH,

/s/ RALPH H. KING

Attorneys for Plaintiffs.

EXHIBIT "X"

PROFIT-SHARING RETIREMENT PLAN (For J. C. Penney Company Management Staff)

This Plan will apply to management staff employees of J. C. Penney Company as specified in the Plan. It will also apply to eligible employees of any wholly owned subsidiary (meaning any subsidiary of which the company owns all the common stock except qualifying shares, if any), and in all cases any reference to J. C. Penney Company will include such subsidiaries. It shall be in the sole judgment of the Administrative Committee to de-

Exhibit "X"—(Continued)

termine, in keeping with the purposes of the Plan, as to eligibility of subsidiaries' employees and what constitutes eligible compensation for them.

The term "compensation" as used herein means the amount received by an employee of J. C. Penney Company under contract as a portion of the profits of the store managed by him, or the amount received by a central or branch office employee as his or her share of the General Office Compensation Fund, as the case may be, and excludes regular salary. If so determined by the Administrative Committee, it may also include other compensation than that specified above, apart from regular salary, based on profits received by employees of J. C. Penney Company.

Purpose

The purpose of this Plan is to institute a means of providing a retirement income for those of its management staff, including store managers and general executives, who remain in the company's employ until retirement.

It is further intended to include and continue the principle of ownership participation which has been such a powerful incentive to the management staff in all the development and operation of the company.

Incidental to such Profit-Sharing Retirement Plan, the company has adopted a retirement policy for its employees. Under this policy an age has been set for retirement when it seems wise to grant employees relief from active service. The setting of

Exhibit "X"—(Continued)

this age also takes into consideration the need for making room on the management staff for younger employees who may contribute quicker recognition and faster development of new and modern merchandising techniques.

Thus, the purpose of the Plan is twofold: to help provide security for those who have served well, and to make available a further incentive to those who serve and are preparing to serve.

To attain such purpose the company has adopted this Plan and caused a Trust Fund to be set up for handling the funds and securities accruing under the Plan. The company has made available for sale at approximate book value to the Trustees of such Trust Fund, a block of the company's stock in order that the management staff, as a group, may enjoy ownership participation in the future, and the company will make such annual contributions as called for under the Plan.

Provisions

1. There shall be a bank or trust company selected by the Board of Directors of J. C. Penney Company which shall act as Trustee under the plan. It shall purchase and hold the J. C. Penney Company common stock hereinafter referred to and shall have voting power with respect thereto. It shall receive all cash or securities paid into the Fund, whether received from participants or the company, and shall collect all income derived from any securities at any time in the Fund. It shall have investment powers with reference to moneys

Exhibit "X"—(Continued)

received by it as prescribed in the Trust Agreement. A copy of the Trust Agreement when executed shall be attached to this plan and marked Exhibit A. Said Trustee shall make all payments and distributions from the Fund and arrange for the distribution of the J. C. Penney Company stock as directed by the Administrative Committee. It shall perform such banking and other functions as are provided for in the Trust Agreement.

2. There shall be an Administrative Committee consisting of five persons appointed by, to serve without compensation and be replaced at the will of, the Board of Directors of J. C. Penney Company. If otherwise eligible, the fact that an employee is a member of this committee shall not preclude his participating in the Plan on the same basis as that of other eligible employees. Such committee shall have authority to perform or direct all operating procedures and functions required in the operation of the Plan and not performed by the Trustee. The Administrative Committee may adopt such rules and regulations with regard to the administration of the plan as are consistent with the terms of the Plan and of the Trust Agreement. In connection with the Plan, the committee shall also have the right in its judgment to interpret the provisions of the Plan, to determine the eligibility and rights of employees as to consecutiveness and length of employment service, in connection with leaves of absence approved by company executives to pass upon question of whether or not withdrawal

Exhibit "X" — (Continued)

from Fund should be required, to decide what constitutes eligible compensation and what constitutes regular salary, to determine what represents the market value of any of the assets of the Fund, and to make any decisions which have to do with operations of the Plan. It shall have the right in its sole judgment to determine the type and form of annuity or other benefits for any participant. It shall have the right in its sole judgment to determine whether all or any part of any receipts (other than participants' contributions) or expenditures during a year shall constitute Fund earnings or expenses for that year or any other year regardless of any other provisions of the Plan and, if any receipts or expenditures are determined not to constitute earnings or expenses, such shall be handled in the accounts of the Fund as directed by the committee. The Administrative Committee shall also have the right to establish any reserves against depreciation of assets which in its opinion are warranted. Such reserves may be set up from any income of the Fund. It shall also have the right to decide that additions to and reductions from any reserves shall affect the earnings of the Fund for any year it specifies. It shall keep adequate record of its proceedings and acts. As to all matters requiring the exercise of discretion by the Administrative Committee, action shall be taken upon the agreement or discretion of at least three of the five members of the Administrative Committee. Ministerial powers in connection with the administration of the

Exhibit "X" — (Continued)

Plan may be delegated by the committee to any member or members thereof.

3. The following classes of employees of the company and of any wholly owned subsidiary shall be eligible to participate in the Plan: store managers and central and branch office employees who have a contract entitling them to receive compensation as hereinbefore defined, which includes store managers, buyers, employees holding positions of responsibility in the central and branch offices of the company, and executives, including those who are directors, but excluding those who serve as directors only. It shall also include employees holding positions of responsibility in any wholly owned subsidiary determined by the Administrative Committee to be eligible. It shall also include any other classes of employees entitled to receive compensation who may be determined by the Administrative Committee at any time to be eligible. Participation by all eligible employees shall be required, except that participation by an otherwise eligible employee whose compensation does not cover a full calendar year shall not be permitted for such year, except in any case where a leave of absence covering that portion of any year for which compensation is not paid is approved by the Administrative Committee as not requiring withdrawal. In any case, however, where a separate manager contract or contracts and/or rights to share in the General Office Compensation Fund each cover only a portion of a year but combined cover a full calendar year, participa-

Exhibit "X"—(Continued)

tion for such year shall be permitted on the basis of total compensation received. In any case or cases where, because of special circumstances, it is recommended that more than one employee of a store shall be considered as an eligible manager, the Administrative Committee shall have sole power to decide as to eligibility.

4. A contribution to the Fund must be made every year by every eligible employee, equal to $33\frac{1}{3}\%$ of his or her compensation earned when such compensation covers a full calendar year, or the portion of the year during which he or she worked when an approved leave of absence was in effect for the portion of the year not covered by the compensation. There shall be no right or requirement of contribution for any period not covered by compensation. The required contribution must be made at the time of payment of compensation to the participant in accordance with instructions of the Administrative Committee. If $33\frac{1}{3}\%$ of any year's compensation for any participant shall be \$500.00 or less, then all of the participant's compensation up to \$500.00 may be contributed. There shall be no privilege of withdrawal of any amount contributed except upon leaving the employ of the company or reaching retirement age or ceasing to be an eligible employee.

5. The company will issue and sell for cash to the Trustee, as soon after the adoption of the plan as practicable, 200,000 shares of the authorized unissued common stock of the company at its approxi-

Exhibit "X"—(Continued)

mate book value per share as at January 1, 1940, or \$30.00, less adjustment for any dividend paid subsequent to January 1, 1940, which adjustment for purposes of the Plan shall be considered dividends. Such Trustee shall hold said stock for distribution in accordance with the terms of the Plan and of the Trust Agreement, provided that said Trustee shall have authority to borrow from outside sources, with this stock as collateral, upon terms approved by the Administrative Committee, a sufficient sum to pay the company the purchase price of said stock, which loan shall be repaid by the Trustee from the earnings of the Fund and any other moneys received by it. The Trustee shall have such other rights with respect to such stock held by it as are contained in the Trust Agreement. In the event of any later purchase of stock by the Trustee through exercise of rights to purchase, or receipt of dividends in the form of stock, or expansion or contraction in the number of shares held by it through any recapitalization, merger, or other change in the form of the company's capitalization, any reference contained herein to a number of shares of J. C. Penney Company common stock shall be deemed to be increased or decreased proportionately as a result of the number of shares resulting from such adjustment and any additional expenditures incurred in connection therewith shall be proportionately applied to the cost of any remaining shares held by the Trustee.

6. J. C. Penney Company shall contribute (sub-

Exhibit "X" — (Continued)

ject to the provisions of Article "15") to the Fund after the close of each calendar year, the following amounts for credit to the accounts as specified in the Plan:

(a) An amount equal to 2% of the prior year's aggregate regular salary paid to all employees receiving compensation as defined in the Plan for all or any part of the respective year. Such annual payment will be discontinued, however, at such time as the Reserve for Retirement account shall, in the opinion of the Board of Directors of J. C. Penney Company, have been built up to such a point as to eliminate the need for further credit of such a contribution.

(b) An amount equal to 6% of the company's net profit for the prior calendar year (including the net profit of any wholly owned subsidiary) available to its common stock (before the application of this provision "6.(b)") as reflected by the books of the company, in excess of 15% of the common stock book value of the company (represented by its capital and undistributed surplus, including the undistributed surplus of wholly owned subsidiaries) as at the beginning of such prior calendar year, except that in any case of increase or decrease of book value during any year by issuance and sale or repurchase of its common stock, proper adjustment shall be made to reflect the increase or decrease in the book value for the portion of the year the book value was affected through such transaction.

Exhibit "X"—(Continued)

7. The following shall apply in connection with the disposition of the shares of J. C. Penney Company stock purchased by the Trustee from the company and of the moneys received by the Trustee hereunder:

(a) A separate account shall be kept for each participant to which his or her contributions shall be credited as of the beginning of the year immediately following that which the compensation covered.

(b) All amounts contributed by the company under Article "6.(b)" shall be placed in an Excess Profits account, no portion of which shall be credited or become available to any participant before withdrawal from the Plan because of retirement or other cause.

(c) The 200,000 shares of J. C. Penney Company common stock shall be separated in the Fund's accounts into two blocks—one of 50,000 and one of 150,000 shares with actual cost (after any dividend adjustment, as prescribed in Article "5") applied to each.

(d) All amounts contributed by the company under Article "6.(a)" above shall be credited as of the beginning of the year immediately after that for which the payment covered, as follows: Earliest receipts shall be credited to the cost of the 50,000 share block until cost of same is entirely covered by such, or other, credits, then to a Reserve for retirement account. However, any such receipt after the first ten years after the adoption of the Plan

Exhibit "X"—(Continued)

shall be credited to a Reserve for Retirement account, regardless of whether the cost of the 50,000 share block is covered.

(e) All cash dividends received by the Trustee on any of the 200,000 shares of stock (including any adjustment made in the cost price of the stock to cover dividends subsequent to January 1, 1940—see Article "5") shall be applied, as received, to any cost in connection with financing the purchase of said stock and then shall be credited to any uncovered cost determined as applying to the 50,000 share block until cost of same is entirely covered, and thereafter shall be credited to a Dividend account. Credits prescribed by this provision shall be subject to the provisions of subdivision "(h)" of this article.

(f) Net earnings from the operation of the Fund for any year (not including dividends on any of the 200,000 shares of J. C. Penney Company common stock) as determined by the Administrative Committee (after charges referred to in subdivision "(h)" of this article) shall be credited after but as of the close of each year to the accounts of those participants still eligible for participation at such year-end. Credit shall be allowed in the proportion that each participant's average credit for the year bears to the average of all the credits for such year of all remaining participants in the Fund at such year-end.

(g) Any other receipts determined by the Administrative Committee to be earnings subject to allo-

Exhibit "X"—(Continued)

cation shall be credited to participants' accounts in such proportionate measure as determined by that committee.

(h) Expenses approved by the Administrative Committee which are incurred by the company or by the Trustee through the operation of the Plan, payment of which is not assumed by the company, shall be charged against any earnings of the Fund to the extent available and any excess shall be charged against the Dividend account or as otherwise directed by the Administrative Committee, except that no part of the same shall be directly charged against participants' contributions. At any time that a deficiency occurs in the Reserve for Retirement account, the Administrative Committee may determine such deficit to be expense and direct charging the same against the Dividend account.

8. Incidental to this Plan, the following retirement policy has been adopted for all active salaried employees of the company and any wholly owned subsidiary, excluding directors who serve in that capacity only:

(a) Effective beginning January 1, 1940, it will be optional with the company in the discretion of the Board of Directors to permit retirement of any employees who have attained or attain the age of 60 years.

(b) Effective beginning January 1, 1945, retirement shall be compulsory for those employees who have attained or attain the age of 60 years, except that in special cases the Board of Directors, in its discretion, may delay from year to year the separa-

Exhibit "X"—(Continued)

tion of any such employee from the company's employment, but such person must, nevertheless, withdraw from participation in the Plan at the retirement age of 60 years.

(c) Effective beginning January 1, 1945, it will be optional with the Company in the discretion of the Board of Directors to permit retirement of any employees who have attained or attain the age of 55 years.

(d) The applicable retirement age for compulsory retirement of all employees shall be deemed to have been reached on the 1st day of July of any calendar year in which he or she attains such age, but not earlier than July 1, 1945. In cases of optional retirement under the terms of subdivisions "(a)" and "(c)" of this article, permission and service termination shall be effective as of July 1 next succeeding the company's permission.

(e) Prior to January 1, 1945, if any eligible employee leaves the employ of the company voluntarily or involuntarily without obtaining permission of the Board of Directors to retire, or, commencing January 1, 1945, if any eligible employee leaves the employ of the company voluntarily or involuntarily after attaining the age of 55 years, but before attaining the age of 60 years, and fails to obtain the permission of the Board of Directors for retirement, he or she shall not be considered, for the purpose of this Plan, to have reached retirement age.

9. Withdrawal of participating employees at all times shall be governed by the following conditions:

(a) Any participant leaving the employ of the

Exhibit "X" — (Continued)

company, voluntarily or otherwise, must withdraw entirely from the Plan, except in cases where a participant secures a leave of absence approved by company executives, and the Administrative Committee approves his or her absence as not requiring withdrawal from the Plan. If a participant during an approved leave of absence leaves the employ of the company for any cause other than attainment of retirement status, or ceases service through death, he or she shall be considered not to have had the leave of absence and to have withdrawn from the Plan as of the date when his or her leave of absence began. However, for purposes of settlement of the account of the withdrawing participant under the terms of Article "10.C", the date of withdrawal for computation of any credit due will be considered to be the actual date of service termination rather than the date that the leave of absence began.

(b) If, after having participated and continuing actively in the company's employ, any participant ceases to have the right to receive compensation, as heretofore defined, for twelve consecutive full calendar months immediately subsequent to participation, such participant must withdraw from the Plan at the end of that period. However, if in the judgment of the Board of Directors of the company the circumstances surrounding such elimination of the right to receive compensation warrant other action, the Administrative Committee shall have the right to require earlier withdrawal or to grant extension of participation for an additional period not to exceed twelve months.

Exhibit "X" — (Continued)

10. The benefits to be distributed from the Fund to participants withdrawing from participation in the Plan shall be as follows:

A. Retirements From Active Salaried Employment: Any participant reaching retirement status as provided in Article "8" will receive:

(a) A paid-up non-assignable annuity to be purchased by the Administrative Committee from an insurance company in such a form as designated by that committee as best meeting the needs of the individual's situation, which shall be purchased with an amount equal to the aggregate of the following:

1. The total of all the participant's own contributions then standing to his or her credit in the Fund, and

2. An amount representing the aggregate, for all years of participation, of the amounts for each year of participation represented by that proportion of the company's contribution based on excess profit for the respective year that the participant's personal contribution for that year bore to all personal contributions for the year, and

3. That proportion of any net balance then in the Dividend account equal to the amount that the participant's total contributions then in the Fund bears to the aggregate contributions of all participants then in the Fund, and

4. The total of all credits to the participant's account representing his or her share of the earnings of the Fund.

Except that, if a participant reaches retirement status and dies before arrangements for purchase of

Exhibit "X"—(Continued)

an annuity are completed, benefits shall be determined under the terms of subdivision "B" of this Article "10". This provision, however, shall in no way affect the right of a beneficiary or legal representative to receive, as outlined under the terms of subdivision "A.(b)" of this Article "10", shares of J. C. Penney Company common stock.

(b) 1. In addition, the retiring participant will receive without cost, from the 50,000 share block of J. C. Penney Company common stock, that number of shares (but never in excess of 1,000 shares) represented by the proportion of 150,000 shares that the participant's total contributions at the time of his or her retirement bear to the aggregate of such contributions of all participants in the Fund at such time—except that at any time that any cost determined as applying to the 50,000 share block is not covered by credits, the participant, in order to receive any shares, must pay the Trustee or have deducted from the amount available for the purchase of his annuity, the net debit cost at the time of retirement of the shares to which he or she is entitled.

2. When the 50,000 share block of stock is exhausted, distribution on retirement shall be from the 150,000 share block, based on the proportion of the remaining shares that the retiring participant's total contributions at the time of his or her retirement bear to the aggregate contributions of all participants at such time. In such event, the stock shall be delivered to the retiring participant without charge and there shall be charged against the Reserve for Retirement account the uncovered cost of the stock

Exhibit "X"—(Continued)

delivered to any retiring participant as represented by the stock account of the Fund. The number of shares to be distributed to any participant shall be limited to 1,000.

3. Adjustment shall be made with any retiring participant to cover any dividends received by the Trustee, on the shares of stock to which the participant is entitled, subsequent to the date of retirement.

4. Adjustment shall be made of any fractional shares resulting from the apportionment as follows: if the fraction is greater than one-half, a full share shall be delivered in lieu thereof; if the fraction is less than one-half, it shall be disregarded.

B. Separations, Other Than Retirements, From Active Salaried Employment and Required Withdrawals Because of Loss of Eligibility or Death of a Participant:

Any participant leaving the employ of the company and not having attained regular or specially approved retirement status, or

Any participant required to withdraw from participation in the Plan, regardless of the circumstances surrounding the withdrawal, including the death of a participant, will receive:

(a) An amount in cash from the Fund computed as at the date of withdrawal by the same method followed in determining the amount which would be used for the purchase of an annuity in the case of a participant attaining retirement age, but said participant shall not be entitled to receive any shares of J. C. Penney Company common stock.

Exhibit "X"—(Continued)

(b) 1. Upon any separation other than a regular or approved retirement, the Administrative Committee may, with the approval and consent of the directly affected participant or the participant's beneficiary in case of death, arrange for the purchase of such annuity or insurance, with the amount of cash due to participant, as appears advisable.

2. Upon the death of any participant, distribution of the amount due the deceased participant shall be made to the designated beneficiary of the participant, or, if such designated beneficiary be dead, or if no beneficiary has been designated, then to the legal representative of the deceased participant, providing that, in any of the foregoing cases, payment of deceased's funeral expenses may be made from such distributive amount before any distribution is made to the beneficiary or legal representative.

3. In any case where the Administrative Committee shall deem it advisable because of current economic conditions or because it shall deem it to be for the best interest of the withdrawing participant, his or her beneficiary or legal representative, the administrative Committee shall have the absolute right in its sole judgment: (a) to defer payment of any amount due a participant, beneficiary or legal representative for a period of 90 days from the date of withdrawal, or (b) to direct payment of any amount due a withdrawing participant or his or her beneficiary or legal representative over a period not to exceed three years after the date of withdrawal, such payments to be made at such times and in such

Exhibit "X" — (Continued)

amounts during such periods as shall be determined by the Administrative Committee. In any case of such deferred payment, no interest on any amount withheld will be paid.

C. Upon any participant's withdrawal, for retirement or otherwise, the market value of all securities held by the Fund, including any remaining shares of the 150,000 share block of J. C. Penney Company stock, but excluding any remaining shares of the 50,000 share block, shall be ascertained as of the date of the withdrawal. After application of any balance in the Reserve for Retirement account to any uncovered cost of any J. C. Penney Company stock included in the computation, the total net cost value of the assets of the Fund (after application of any reserve for depreciation of assets) shall also be determined. Notwithstanding the provision "A" and "B" of this article, if the market value should be less than such net cost value of the assets, there shall be deducted from any credit due the withdrawing participant his or her share of the deficiency measured by the ratio that the withdrawing participant's total right of withdrawal (without J. C. Penney Company common stock due upon retirement) bears to the total credit that would that day be due to all participants if withdrawing.

D. No circumstances arising subsequent to the effective date of withdrawal shall entitle any withdrawn participant to any benefit other than as determined as of the effective date of withdrawal.

11. Any reference in this Plan to "market" price or value shall be taken to mean the average of the

Exhibit "X" — (Continued)

closing bid and asked prices for the next five consecutive business days immediately following the date referred to. In the event that closing market prices as referred to are not available for any day or days, then the Administrative Committee shall be empowered to use such price or value as in its judgment is proper.

12. Contributions by participants to the Fund upon the basis as provided in Article "4" shall be mandatory except that the Administrative Committee shall have the right in its sole judgment when it deems that exceptional circumstances in connection with a participant's financial affairs require it, to reduce by such amount as it deems necessary under the circumstances, the required contribution of such participant for any particular year. Such reduction shall only be made upon application of a participant which shall disclose fully the reason upon which the participant relies in making such request.

13. Loans to participants from the Fund shall not be made under any circumstances and no participant shall assign, pledge, or encumber any part of his or her interest in the Fund and any attempt to do so shall be inoperative and void.

14. The Administrative Committee shall determine what in its judgment constitutes necessary detail work and records for the operation of the Fund. Expenses of the Trustee and of J. C. Penney Company in the operation of the Plan may, in the discretion of the Board of Directors of the company, be borne in whole or in part, by the company or by the Fund.

Exhibit "X"—(Continued)

15. J. C. Penney Company shall, in the sole judgment of its Board of Directors, have the power to at any time increase, decrease, or dispense with any company contribution called for under the Plan, and shall also have the power to substitute any form of stock or securities for cash. In case of any such increase or decrease in contribution or any substitution, it shall be in the sole judgment of the Administrative Committee to decide as to disposition, in the accounts of the Fund, of the increase or decrease and, also, as to any such substitution, to decide as to the value to apply in making any credit on any of the accounts of the Fund.

16. J. C. Penney Company does not guarantee any of the benefits provided in this Plan, but contributions once made by the company shall be irrevocable and no part of the Fund in the possession of the Trustee, excepting so much of the moneys for which it may be reimbursed for expense of operation of the Plan, shall ever revert to the company or be diverted to or used for any purposes other than for the exclusive benefit of eligible employees covered by the Plan.

17. The Board of Directors shall have the right to alter, modify, or amend in whole or in part, any of the provisions of this or any incidental plan, provided, however, that such alterations, modifications, or amendments shall not in any way be in contravention of the provisions of Article "16".

18. In any case or cases that it is impossible or because of economic conditions or special conditions pertaining to a retiring participant, it appears im-

Exhibit "X"—(Continued)

practicable or inadvisable to purchase an annuity or annuities, the Administrative Committee shall have the right in its discretion, and subject to the approval of the company's Board of Directors, to substitute such form of settlement as it deems advisable and in keeping with the purposes of the Plan for any annuity due a retiring participant.

19. In the discretion of the Administrative Committee, in order to safeguard the interests of all participants in the Fund, when current economic conditions shall make it appear advisable, any withdrawing participant or a beneficiary or legal representative entitled to receive cash from the Fund shall receive, in lieu of the distributive amount due to him or her, his or her prorata share of the Fund (as determined under Article "10") in cash and/or in securities of the Fund (exclusive of any of the 200,000 shares of J. C. Penney Company common stock) at the market value of the assets of the Fund on the date of withdrawal.

20. Neither the Trustee nor J. C. Penney Company nor the members of the Administrative Committee at any time functioning under the Plan shall be liable in any way if the Fund should prove insufficient to provide the benefits herein contemplated, or for any depreciation in the market or book value of the J. C. Penney Company common stock purchased by the Trustee occurring by reason of its continuing to hold the same for the purposes of the Plan.

21. Neither the establishment of this Profit-Sharing Retirement Plan nor any incidental plan nor

Exhibit "X" — (Continued)

any action hereafter taken by the Trustee or by the Board of Directors of J. C. Penney Company or by the Administrative Committee thereunder shall be construed as giving to any employee a right to be retained in the service of the company or any right or claim to any benefits under the Plan after discharge from the service of the company, unless the right to such benefits shall have accrued prior to such discharge.

22. The Plan and Trust Agreement shall be read as an entirety, and anything contained in the latter shall be deemed a part of the Plan even though not contained herein.

23. The Administrative Committee shall annually furnish to each participant a statement of his or her account and shall furnish or make available at its New York office, a copy of the annual statement of the accountings of the Trustee. Any participant desiring to make objection thereto shall give written notice thereof to the committee within sixty (60) days after the date that a copy of either such statement is furnished or made available to such participant. Failure to object within such period shall bar any right thereafter to object to any of the accounts or proceedings covered by either such statement.

24. Discontinuance of the Plan and rights of participants upon discontinuance shall be governed by the following conditions:

(a) The Plan may be discontinued at any time upon recommendation of the Administrative Committee subject to the approval of the Board of Directors of J. C. Penney Company and of the stock-

Exhibit "X"—(Continued)

holders of the company. Announcement of the discontinuance shall be made at least six months before its effective date. On and after the date of such announcement, there shall be no contributions by either the company or by participants, except as otherwise provided in this article.

(b) As of the effective date of discontinuance, an amount for each participant shall be determined in accordance with the method prescribed under the terms of Article "10.B". There shall also be ascertained the ratio that the market value of assets then in the Fund (exclusive of any of the 200,000 shares of J. C. Penney Company common stock then remaining) bears to the book value of such assets, as shown on the accounts of the Fund after application of any reserves against depreciation of such assets. Each participant shall receive credit of an amount computed by applying the ratio so ascertained to the amount so determined under Article "10.B" as above.

(c) As of the effective date of such discontinuance, all shares then remaining in the Fund of the 200,000 shares of J. C. Penney Company common stock shall be considered as one block. From this block a number of shares for each participant shall be determined by the Administrative Committee, based upon the proportion that the participant's total contributions then in the Fund bears to the total of all participants' contributions then in the Fund, (with adjustment for fractional shares as determined by the Administrative Committee to be proper), except that the maximum number of shares

Exhibit "X"—(Continued)

for each participant shall not exceed 1,000. Any such excess of shares shall be proportionately allotted to other participants on the basis of contributions then in the Fund, subject to the 1,000 share maximum. In the event that excess shares above the maximum remain after allotment of 1,000 to each participant, the aggregate of such excess shall be equally allotted to all participants.

(d) The uncovered cost of all shares remaining of the 200,000 shares of J. C. Penney Company stock after application of any balance in the Reserve for Retirement or other reserves applicable as directed by the Administrative Committee to such shares, shall be determined. An amount representing the proportion of such uncovered cost shall be determined for the shares of stock allotted to each participant under "(c)" of this article, and any credit due to a participant as determined under "(b)" of this article shall be applied against such uncovered cost. If the credit for a participant under "(b)" equals or exceeds his or her uncovered cost under "(d)", such shares of stock and the balance of his or her credit, if any, shall be delivered to the participant subject to the provisions of Article "10.B(b)3". To the extent that the uncovered cost of a participant's shares is not covered by his or her credit, he or she shall be entitled at any time to pay such uncovered cost in cash, and such shares shall as of that date be delivered to the participant.

(e) If there remains uncovered cost for any participant not covered by credits or payments as provided in subdivision "(d)" of this article, then dis-

Exhibit "X"—(Continued)

tribution of the stock of such participant shall be deferred and future dividends shall be applied against the balance of such participant's uncovered cost. The company shall continue all contributions called for under the Plan, the total of which will be credited each year to the accounts of the remaining participants in the proportion that each participant's total contributions then in the Fund bears to all participants' contributions then in the Fund. At any time that any participant's share of such credits equals his or her portion of the uncovered cost, his or her shares of the stock shall be delivered to the participant. In any event, the company shall at the end of five years after the effective date of discontinuance, contribute an amount to the Fund sufficient to cover any balance of uncovered cost then remaining.

(f) In the discretion of the Administrative Committee, in order to safeguard the interests of all participants in the Fund, any amount due to participants under this article, other than J. C. Penney Company common stock, may be distributed in cash and/or securities of the Fund. The settlement value of any such securities shall be the market value as used in computations under this article.

25. Each participant in the Plan shall be required to sign a statement to the effect that he or she has read the terms of the Plan and the Trust Agreement, and that he or she understands the same. In accepting the terms of the Plan with the understanding that he or she will receive the benefits provided for thereunder, each participant authorizes the com-

Exhibit "X" — (Continued)

pany, or such person or persons as may be designated by it for the purpose, to administer the Plan and to do such acts as the company may deem necessary or advisable, to give effect to the provisions of the Plan and of the Trust Agreement.

Effective Dates:

The Plan is adopted effective as at January 1, 1940 except that:

(a) The requirement as to compulsory contributions of $33\frac{1}{3}\%$ of compensation shall apply to compensation paid covering any calendar year starting on or after January 1, 1940. However, any employee who participates in the Plan, and would have been eligible for the full year of 1939, if the Plan had been in effect during that period, or who would have been eligible for a portion of the year of 1939 and who had an approved leave of absence for the balance of that year shall have the privilege of contributing to the Fund, in accordance with instructions of the Administrative Committee, for credit to his or her account as at January 1, 1940 any amount up to $33\frac{1}{3}\%$ of compensation received for 1939 and paid in 1940. If $33\frac{1}{3}\%$ of 1939 compensation amounted to \$500.00 or less, then all of the participant's compensation up to \$500.00 may be contributed to the Fund. However, if any participant shall cease active employment prior to July 1, 1942, his or her own contribution to the Fund from 1939 compensation and other participants' contributions to the Fund from 1939 compensation shall not be used in measuring the number of shares of the J. C. Penney Com-

Exhibit "X" — (Continued)

pany common stock to which he or she is entitled in any retirement settlement.

EXHIBIT "A"

J. C. PENNEY COMPANY
PROFIT-SHARING RETIREMENT PLAN
(For Its Management Staff)

Agreement of Trust

Know All Men by These Presents, that

Whereas, J. C. Penney Company, a Delaware Corporation having its office at 330 West 34th Street, New York, N. Y. has adopted, effective as of January 1, 1940, a Profit-Sharing Retirement Plan for such of its employees as are eligible to participate under the terms of said Plan, which Plan may from time to time be altered, modified, or amended by the Company, subject to the restrictions hereinafter set forth, and is hereinafter referred to as "Plan", and

Whereas, a copy of this Agreement of Trust is attached to and made a part of said Plan; and

Whereas, funds must be contributed under said Plan by eligible employees of J. C. Penney Company (including eligible employees of wholly owned subsidiaries as defined in the Plan) and by J. C. Penney Company, which funds as and when contributed will constitute a Fund to be held for the benefit of said eligible employees under and in accordance with the Plan, and no part of which at any time will be used for or diverted to any other purpose except for paying such debts and liabilities of

Exhibit "A"—(Continued)

the Trustee, designated hereunder, as it shall incur under the terms and provisions of, or as permitted by, this Agreement of Trust and for defraying the actual expenses of administering the Plan and the Fund and,

Whereas, as a part of said Plan, J. C. Penney Company will issue, sell and deliver to the Trustee hereunder, Two Hundred Thousand (200,000) shares of its authorized unissued Common stock, upon payment by the Trustee to the Company of the sum of \$5,700,000, namely at the rate of Twenty-Eight and 50/100 (\$28.50) Dollars per share (being Thirty Dollars (\$30.00) per share less adjustment for two dividends of Seventy-Five Cents (\$.75) per share paid respectively on March 30, and June 29, 1940) which stock will be held by said Trustee under and in accordance with the terms and subject to the provisions of this Agreement of Trust, and

Whereas, in order to carry out the provisions of the Plan it is necessary that a Trustee be designated to hold, administer and disburse such funds and to acquire, hold and distribute such stock, and

Whereas, the Chase National Bank of the City of New York has agreed to act as the Trustee hereunder,

Now, Therefore, this Agreement of Trust, Witnesseth that it is hereby agreed by the Company, on its own behalf and on behalf of each person who now is, or hereafter becomes, a participant in, or now or hereafter has any interest under, the Plan, as follows:

First: As used herein:

Exhibit "A"—(Continued)

The word "Company" means J. C. Penney Company and its successors.

The word "Trustee" means The Chase National Bank of the City of New York, and any successor Trustee from time to time acting as Trustee hereunder.

The word "participant" means any person in the service of the Company or a wholly owned subsidiary as defined in the Plan, who shall be eligible to participate in the Plan under and in accordance with its terms, and shall also be construed to include the beneficiary or legal representative of a deceased participant.

The word "Fund" shall mean all moneys, whether principal or income, shares of J. C. Penney Company stock, or other securities or other property, at any time received or held by the Trustee hereunder.

The words "indebtedness of the Trustee" or "debts of the Trustee" or "liabilities of the Trustee", or any similar expression used in this Agreement of Trust, shall be deemed to include any note or other evidence of indebtedness executed by the Trustee, as Trustee under this Agreement of Trust, notwithstanding the fact that such Trustee will not be liable personally or individually for the indebtedness, liabilities or debts evidenced thereby. The words "creditor of the Trustee" or any similar expression shall be deemed to include the holder of any such note or other evidence of indebtedness.

Where reference is made herein to the 200,000 shares of J. C. Penney Company Common stock to be purchased by the Trustee from the Company, it

Exhibit "A"—(Continued)

is understood that, if the number of shares in the Trustee's hands at any time increases or decreases by reason of stock dividends, exercise of rights to purchase stock, or by reason of any expansion or contraction in the number of shares through recapitalization, merger or other change in capitalization of the Company, said 200,000 shares, or any part thereof in the hands of the Trustee at any time, shall be deemed to be increased or decreased proportionately as the result of the number of shares resulting from such adjustment. Any shares of stock or other securities, received by the Trustee, in addition to or in lieu of or in substitution for, or on account of, said 200,000 shares, shall be held by the Trustee on the same terms as said 200,000 shares.

Second: A. The Trustee shall act and shall be fully protected in acting hereunder in accordance with written instructions, directions or authorizations from the Company. The Company shall file with the Trustee a certified copy of resolutions of the Board of Directors of the Company, adopted from time to time, specifying the method or methods by which the Company shall give directions, instructions or authorizations to the Trustee under various provisions hereof.

B. The Company shall also have the right, by resolutions of the Board of Directors, to appoint an Administrative Committee to direct and manage the operation of the Plan. Upon the appointment of such Administrative Committee and until notice to the contrary has been received in writing by the Trustee from the Company, the Administrative

Exhibit "A"—(Continued)

Committee shall act for the Company in issuing written instructions, directions or authorizations to the Trustee. So long as an Administrative Committee shall be in existence, the term "Company" as used in this Agreement, shall mean the Company acting through the Administrative Committee.

C. In the event that any of the provisions of this Agreement of Trust shall be inconsistent with the provisions of said Plan, the provisions of this Agreement of Trust shall control.

Third: A. The Trustee from and after the first day of January, 1940 shall receive all contributions under the Plan, made by participants or by the Company, to be held, maintained, invested and applied by the Trustee in the manner, for the purposes, and to the extent hereinafter provided.

B. Moneys, received as contributions to the Fund from participants or from the Company, shall be received by the Trustee from the Company, and the Trustee shall not be responsible for the collection of any moneys from participants or from the Company, nor for the correctness of the amount of contributions from the Company or from participants paid over to it.

C. The Company shall promptly pay over to the Trustee, from time to time as received by or available to it, all such contributions made by participants or by the Company, whether heretofore or hereafter made.

Fourth: A. The trustee shall purchase forthwith, subject to the provision of Article Twenty-First, from J. C. Penney Company 200,000 shares

Exhibit "A"—(Continued)

of its authorized unissued Common stock for \$5,700,000, to be held and disposed of by the Trustee as in this agreement provided, subject to the receipt of sufficient moneys by means of a loan from Continental Illinois National Bank and Trust Company of Chicago pursuant to the direction of the Company.

B. The Trustee is authorized and empowered to borrow from Continental Illinois National Bank and Trust Company of Chicago (hereinafter referred to as the "Bank") the sum of \$5,700,000 to enable the Trustee to purchase said shares of stock, and to issue in connection with said borrowing the Trustee's promissory note or notes, as Trustee, and to pledge all of said shares of stock and other assets of the Fund as collateral, and to enter into and deliver a loan agreement with said Bank, all under any terms and provisions directed by the Company.

Inasmuch as it is hereinafter provided that moneys received by the Trustee from dividends, and from the Company's and participants' contributions under the Plan shall be paid to the Bank on account of payment of interest and principal of such loan and any additional loans by the Bank (excepting a sum not to exceed in the aggregate \$150,000), the Trustee, in order to provide for an additional fund required for payments to participants, for interest on or expenses in connection with such loans, taxes and the administration of the trust, is authorized to make additional loans from the Bank, providing that the aggregate principal amount of all loans from said Bank at any

Exhibit "A"—(Continued)

time outstanding (including the original loan and all such additional loans) shall never exceed \$5,700,000., or such lesser amount as shall be agreed upon in any note or loan agreement entered into between the Bank and the Trustee. The terms of such additional loans and loan agreements shall be such as are directed by the Company.

C. If any loan made as above specified is not paid in full upon maturity, and there are not sufficient moneys in the hands of the Trustee with which to pay the loan, the Trustee shall promptly advise the Company. The Trustee shall be under no duty to take any steps looking to the renewal or the replacement of the loan except in the manner and on the terms and conditions as directed by the Company. If the Company elects, it may make such advances on account of future contributions as may be necessary to secure a renewal or a replacement of the loan. The Company, however, shall, in the event that there shall be outstanding and unpaid any indebtedness of the Trustee to said Bank, have no right to make such advances on account of said future contributions to secure renewals or replacements of loans, unless the Company either (1) has the consent of said Bank or (2) such advances by the Company are made for the purpose of putting the Trustee in funds to be used to pay all such indebtedness in full and such funds are so used. Any advances so made, or made under B (3) or B (4) of Article Fifth shall be credited as directed by the Company. If the Company is not permitted hereunder or elects not to

Exhibit "A"—(Continued)

make such advances and if any or all of the stock pledged by the Trustee is sold by the creditor, there shall be no liability on the Trustee nor on the Company nor on any member of the Administrative Committee because of any loss to participants resulting from such sale.

All renewals or replacements of any loan at any time made by the Trustee shall be upon such conditions and be subject to such terms and provisions as may be directed by the Company, whether such conditions, terms or provisions shall be the same as or different from the loan renewed or replaced.

The Trustee shall likewise have authority to borrow sufficient moneys to pay in full before maturity all indebtedness of the Trustee to the Bank but shall be under no duty to take any steps looking to such payment of the indebtedness excepting at the request of, in the manner, and on the terms and conditions as directed by the company.

If all indebtedness to the Continental Illinois National Bank and Trust Company of Chicago shall be paid on or before maturity and such payment shall be made through the medium of a loan or loans from a lender or lenders other than the said Bank, then after all said indebtedness has been paid to said Bank and a loan or loans have been made by such other lender or lenders, the term 'Bank' as used in this Agreement of Trust shall thereafter be interpreted to mean such other lender or lenders, and all provisions in this Agreement of Trust wherein the term 'Bank' is used shall apply to said other lender or lenders with the

Exhibit "A"—(Continued)

same force and effect as they theretofore have applied to the Continental Illinois National Bank and Trust Company of Chicago.

The Trustee and the Company respectively shall perform and comply with all terms or provisions of any note evidencing, or loan agreement with respect to, any loan to the Trustee to the extent that such terms or provisions are applicable to the Trustee or Company.

D. Anything in the Plan or this Agreement of Trust to the contrary notwithstanding, except as hereafter provided in subparagraph E of this Article, the Trustee shall apply all cash dividends, received by it on the shares of J. C. Penney Company stock above referred to, as well as all other moneys received by it from J. C. Penney Company or from participants in the Plan, from time to time when and as received by it as follows:

First, the Trustee shall have the right to reserve from such moneys so received by it an amount, sufficient, in the judgment of the Trustee to pay interest on all outstanding indebtedness of the Trustee to the Bank, which will accrue up to and including the second quarterly interest payment date of loans by the Bank to the Trustee occurring after such receipt by the Trustee, and the Trustee shall, if such reservation is made, pay to the Bank when due the interest due on indebtedness to said Bank on such next two ensuing quarterly interest payment dates, and any excess of such amounts so reserved, which shall remain after the payment of such interest, shall be paid to said Bank and

Exhibit "A"—(Continued)

shall be applied on unpaid principal of such indebtedness, whether or not such principal shall then be due.

Second, any balance of such moneys, so received by the Trustee and not so reserved, shall be paid to said Bank, to be credited first on any then matured and unpaid interest and then on any unpaid principal of any such indebtedness of the Trustee to the Bank, regardless, in any case, of whether or not such principal shall then be due.

E. Notwithstanding the provision of subparagraph D, of this Article the Trustee shall, however, have the right to retain and withhold from payment to the Bank, at any time or times at which there shall be no existing default in payment of such indebtedness of the Trustee to the Bank, on account of either principal or interest of any indebtedness of the Trustee to the Bank, the aggregate sum of \$150,000.00 from the moneys received by it as dividends or contributions from the Company or from participants in the Plan, to be used for the same purposes as the additional loans from the Bank above provided for, such right of the Trustee shall, however, terminate from and after the time at which such aggregate sum shall have been so withheld, whether such withholding shall have been at one time or from time to time.

F. Anything in this Agreement of Trust or the Plan to the contrary notwithstanding however, the Company shall not amend or change any of the terms or provisions of this Agreement of Trust or said Plan which directly or indirectly affects any

Exhibit "A"—(Continued)

of the rights or benefits of the Bank without the consent in writing of the Bank, as long as there shall be any outstanding indebtedness or liabilities of the Trustee to the Bank in connection with its loans to the Trustee, except as may otherwise be provided in any evidence of indebtedness held by or loan agreement with the Bank.

G. The Company shall not consent to, or take any steps to accomplish, the termination or discontinuance of the Plan or this Agreement of Trust at any time at which there shall be any outstanding indebtedness or liabilities of the Trustee to the Bank in connection with its loans to the Trustee as herein provided.

H. The terms of any note, loan or loans or loan agreements to be made by the Trustee under Article Fourth hereof or under any other provision of this Agreement of Trust shall be in the form directed by the Company, and such terms are expressly consented to and shall be binding on all persons interested in this agreement as participants or otherwise. In the event that the terms and provisions of any note or loan agreement so executed by the Trustee shall be inconsistent with the provisions of the Plan or this Agreement of Trust, the provisions of such note or loan agreement shall govern. It is the intention hereof that the Trustee shall be fully protected in executing any note or loan agreement in the form directed by the Company.

I. All provisions of this Agreement of Trust which are for the benefit of the Bank shall inure

Exhibit "A"—(Continued)

also to the benefit of the holders of any indebtedness hereunder originally incurred by the Trustee to the Bank.

Fifth: A. Subject always to collateral purposes in connection with any loan and to the rights of pledgees:

The Trustee shall at all times retain the J. C. Penney Company Common stock for distribution to participants as directed by the Company from time to time, and, upon such directions being given, the Trustee shall take the necessary steps to have the requisite number of shares transferred into the name of the participant for delivery. All expenses in connection with such transfers shall be a charge against the Fund. The Board of Directors of the Company, if in its discretion economic conditions make it advisable, shall, however, have the power to direct the Trustee to sell all or any part of the 200,000 shares. Upon receipt of a certified copy of a resolution to such effect, the Trustee shall, as soon as it is able so to do, follow the directions therein contained. If any such sale of stock is made, the proceeds shall be considered, for the purposes of the Plan, as constituting a substitution for the stock sold, and the proceeds shall be invested or otherwise disposed of as directed in writing by the Company under and in accordance with the general purposes of the Plan. Such investments may be made in stocks, either common or preferred, bonds, notes or other evidences of indebtedness or other securities even though the same may not be legal investments for trustees

Exhibit "A"—(Continued)

under the laws applicable hereto. Such proceeds together with any moneys held by the Trustee under subparagraph B(4) of Article Fifth and the investments and reinvestments thereof shall be held as a separate fund hereunder unless the Board of Directors should direct the Trustee to consolidate such fund with the other investments held hereunder.

B. The trustee shall, subject always to collateral purposes in connection with any loan and to the rights of pledgees, have the following additional powers with respect to the shares of J. C. Penney Company Common stock purchased by it as provided in this agreement:

(1) The Trustee is authorized but not directed to vote the shares of stock or to otherwise consent to or request any action on the part of the Company and to give general or special proxies or powers of attorney with or without power of substitution.

(2) To receive any stock dividends, which when received shall become a portion of the stock in the Fund and shall be added to and treated as forming a part of the original 200,000 shares.

(3) If the Company in connection with the 200,000 shares of J. C. Penney Company stock shall issue rights to purchase additional stock, and at the time of the issuance of such rights there is any unpaid indebtedness to the Bank, the Trustee shall have the following power and authority:

a. If the Company shall notify the Trustee and the Bank that the Company deems it advisable to

Exhibit "A"—(Continued)

exercise all such rights and if the Bank shall agree that it is advisable to exercise such rights and shall within five days from the receipt of such notice, either make an additional loan to the Trustee upon terms and conditions directed by the Company, sufficient with which to enable it to exercise such rights, or shall within the same length of time by agreement with the Company grant it the right to make advances upon its future contributions to be used for the purpose of exercising such rights, and the Company shall make such advances, the Trustee shall exercise such rights, otherwise it shall sell such rights.

b. If the Company shall notify the Trustee and the Bank that it deems it advisable to sell all rights issued in connection with such stock, the Trustee shall sell such rights in the event that the Bank does not within five days after the receipt of such notice, loan to the Trustee upon terms and conditions directed by the Company, a sufficient sum of money to enable the Trustee to exercise such rights. In the event that such loan is made by the Bank to the Trustee, the Trustee shall exercise such rights.

c. If the Company shall notify the Trustee and the Bank that it desires the Trustee to sell a sufficient number of said rights so that the Trustee may be able to exercise the rights with respect to the balance of the stock, the Trustee shall sell such number of rights in order to exercise the rights with reference to the balance of the stock in the event that the Bank does not within five days after

Exhibit "A"—(Continued)

the receipt of such notice loan to the Trustee, on terms and conditions directed by the Company, a sum of money sufficient with which to exercise all such rights. In the event that such loan is made by the Bank to the Trustee, the Trustee shall exercise such rights.

d. If the Company shall fail to notify the Trustee and the Bank whether it deems it advisable to exercise such rights, to sell such rights, or to exercise such rights in part and sell such rights in part, within fifteen days prior to the last date for the exercise of such rights, the Trustee shall sell such rights at such time prior to the expiration date as it deems advisable.

e. If any loan is made by the Bank to the Trustee as provided in subparagraphs a, b, and c immediately above set forth, the Trustee shall have full power and authority to issue its note to evidence such loan and to execute any loan agreement in connection therewith, the terms and provisions of any such note or loan agreement to be as directed by the Company.

f. All stock received by the Trustee as a result of the exercise of the rights shall be pledged with the Bank as a part of the collateral securing any indebtedness from the Trustee to the Bank, and the proceeds of all rights which are sold, shall be paid over by the Trustee to the Bank and shall be applied by it first against any matured and unpaid interest and the balance against the principal of any indebtedness from the Trustee to the Bank, whether or not then due.

Exhibit "A"—(Continued)

g. Any stock so purchased through the exercise of rights shall be added to and treated as a part of the original 200,000 shares.

h. The rights of the Bank and the duties of the Trustee in connection with any loans, made under the provisions of Article Fifth B (3) shall be the same as with respect to other loans made by the Bank to the Trustee as set forth in this agreement except as otherwise provided in any note or notes, or loan agreement or loan agreements executed by the Trustee in connection with such loan or loans.

(4) If the Company in connection with the 200,000 shares of J. C. Penney Company common stock shall issue rights to purchase stock and at the time of issuance of such rights there is no unpaid indebtedness to the Bank, the Trustee shall have the following power and authority.

a. If the Company shall notify the Trustee at least fifteen days prior to the final date set for the exercise of the rights, that it deems it advisable to sell all rights issued in connection with such stock, the Trustee shall sell such rights at such date prior to the final date set for the exercise of the rights as it shall deem advisable.

b. If the Company shall fail to notify the Trustee as provided in subparagraph a immediately above set forth, the Trustee shall exercise the rights to purchase additional stock out of moneys in its hands, which stock when purchased shall be added to and treated as forming a part of the original 200,000 shares. If it does not have sufficient moneys with which to purchase such stock, it shall forth-

Exhibit "A"—(Continued)

with notify the Company in writing and the Company shall have the right within five days thereafter to notify the Trustee that it will advance a sufficient sum of money on account of its future contributions to enable the Trustee to exercise its rights to purchase such stock. In the event of such notification the Company agrees to advance such moneys prior to the final date upon which such rights can be exercised. If within such five day period the Company shall either advise the Trustee that it will not make such advances or shall fail to advise the Trustee that it will make such advances, the Trustee will borrow sufficient funds with which to exercise such rights issuing its promissory note or notes as Trustee as evidence of such indebtedness and using the J. C. Penney Company stock or other securities as collateral. If the Trustee is unable to borrow a sufficient sum with which to exercise all or any part of such rights, it shall have the right to sell the rights or sell a portion of the rights and use the funds received from such balance together with any moneys then in its hands to exercise the balance of such rights.

c. Any moneys received from the sale of rights and not used to purchase stock through exercise of rights shall be held by the Trustee in lieu of the stock and shall be invested or otherwise disposed of as directed in writing by the Company under and in accordance with the general purposes of the Plan. Such investments may be made in stocks, either common or preferred, bonds, notes or other evidences of indebtedness or other securi-

Exhibit "A"—(Continued)

ties even though the same may not be legal investments for trustees under the laws applicable hereto. As set forth in subparagraph A of Article Fifth such moneys together with any proceeds of sale under said subparagraph A of Article Fifth and the investments and reinvestments thereof shall be held as a separate fund hereunder unless the Board of Directors should direct the Trustee to consolidate such fund with the other investments held hereunder.

(5) The Trustee shall have the right to participate in reorganizations, recapitalizations, mergers and similar transactions with respect to such stock and to hold the stock or other securities with re-a result thereof, in lieu of the stock relinquished in such transaction and/or in conjunction with, the balance of the 200,000 shares of the J. C. Penney Company stock then remaining in its hands.

(6) The trustee shall transfer, assign and deliver to any creditor, who holds as collateral for its loan, all or any portion of the said 200,000 shares of J. C. Penney Company stock, any additional or substituted shares of stock or other securities, received by the Trustee as a stock dividend or through the exercise of rights to purchase additional stock, or received by the Trustee, by virtue of the provisions of subparagraph (5) of this Article Fifth, to be held by such creditor as collateral for its loan, and shall pay over to such creditor any cash similarly received.

Exhibit "A"—(Continued)

Sixth: A. The Trustee shall manage the Fund. It shall invest and reinvest the Fund, provided, however, that no funds in the hands of the Trustee shall be invested or reinvested without the consent of the Bank until all loans to the Trustee by said Bank shall have been paid in full. The Trustee shall at all times have as its primary purpose the conservation of the principal of the Fund. For this reason the Trustee (except in so far as it uses or reserves moneys received or earned to pay in full or on account any loans to or liabilities or debts of the Trustee) shall be limited in its investments and reinvestments to securities issued by the United States of America and to securities issued by any governmental agency of the United States of America, the payment of principal and interest of which is unqualifiedly guaranteed by the United States of America. The maturity date of any security so purchased shall not be later than ten (10) years after the date of the purchase of the particular security. Within this limitation, and subject to the provisions of subparagraph D of Article Fourth, the Trustee shall have full power and authority to purchase, sell and exchange, invest and reinvest any and all moneys, securities or other property from time to time comprising the Fund, including income earned on the Fund. The Board of Directors of the Company, by notice in writing, may at any time amend this subparagraph so as to alter in any manner the limitations upon the class of securities in which the Fund may be invested and reinvested and, in the event of such an amend-

Exhibit "A"—(Continued)

ment, the Trustee shall, as to investments and re-investments made thereafter, be subject to the amended limitations specified by the Board of Directors of the Company.

B. Subject to the provision of subparagraph D of Article Fourth, the Trustee shall have full power to reserve from investment and keep unproductive of income any amounts or parts of the Fund as it may at any and all times deem advisable.

C. The provisions of this Article Sixth shall not apply to the 200,000 shares of J. C. Penney Company stock, special provisions for which are made in Articles Fourth and Fifth hereof, but shall apply to the cash dividends received on said stock, subject, however, to the provisions of subparagraph D of said Article Fourth.

Seventh: Subject to the rights of any creditor of the Trustee to whom it is indebted for money borrowed hereunder and to the provisions of subparagraph D of Article Fourth hereof, the Trustee upon receiving written directions from the Company shall from time to time make deliveries to it of shares of stock from the 200,000 shares of J. C. Penney Company stock transferred into the names of and for distribution by the Company to participants entitled thereto and shall likewise make payments and other disbursements out of the Fund. Checks or other vouchers for such payments shall be made payable to such persons (including in the term "persons", insurance companies in connection with the purchase of annuities and life insurance policies and corporations named by participants as

Exhibit "A"—(Continued)

beneficiaries) at such times, in such manner and in such amounts as may be specified in the written directions of the Company, and shall be delivered by the Trustee to the Company for distribution by the Company under and in accordance with the terms of the Plan. Upon such payments or disbursements being made, the amount thereof shall no longer constitute a part of the Fund hereunder. All such payments or disbursements shall be made from principal or income without distinction.

Eight: The Trustee shall have the following further duties and powers:

A. After any initial loan by the Bank, made in connection with the purchase of the 200,000 shares of J. C. Penney Company Common Stock, and any additional loans, by the Bank, shall have been paid in full, or at any earlier date if the Bank shall consent, the Trustee, in its discretion, shall have power to borrow money in such amounts and upon such terms and conditions as it shall deem advisable or proper to carry out the purposes of the trust, or to pay off then existing indebtedness of the Trustee, and for sums so borrowed, to issue its promissory note or notes as Trustee, and to secure the payment thereof by pledging all or any part of the Fund. Any interest paid by the Trustee in respect of any such loans shall be a charge against the Fund.

B. The Trustee may, with the approval of the Company, take and hold any security or other property constituting a part of the Fund in bearer form or in its own name or in the name of its nominee

Exhibit "A"—(Continued)

or nominees without disclosing its fiduciary capacity. The name of the nominee or nominees shall be disclosed by the Trustee to the Company at its request.

C. The Trustee may employ suitable agents and counsel and pay therefor reasonable compensation and expenses.

D. If at any time the Company shall be incapable for any reason of giving directions, instructions or authorizations to the Trustee as herein provided for, the Trustee may act and shall be protected in acting (except in selling all or any part of the 200,000 shares of J. C. Penney Company Common Stock), without such directions, instructions or authorizations, as the Trustee in its discretion deems appropriate and advisable under the circumstances for the carrying out of the provisions of this Trust.

E. The Trustee shall file with the Company on or before March 1st of each year, a statement of its accounts and proceedings during the next preceding calendar year. In the absence of any exception thereto filed in writing with the Trustee by the Company within a period of ninety days after its receipt, such statement shall constitute a final accounting by and discharge of the Trustee, with respect to such accounts and proceedings, and shall be binding and conclusive upon the Company and upon all employees or persons having or claiming an interest in the Fund other than the Bank. No person having an interest in the Fund, other than

Exhibit "A"—(Continued)

the Bank, shall have the right to demand any further or different accounting by the Trustee.

Ninth: A. The Trustee shall be paid such reasonable compensation, as shall from time to time be agreed upon in writing by the Company and the Trustee, together with its expenses. The Company shall determine each year whether said compensation and expenses shall be paid by it or shall constitute a charge against the Fund. It shall advise the Trustee of its determination and in any year in which the compensation and expenses of the Trustee are not paid by the Company, the Trustee shall pay the same to itself out of the Fund. All personal property taxes, income taxes, and other taxes of any and all kinds whatsoever which may be levied or assessed under existing or future laws, upon or in respect of the Trust hereby created, or the Fund or any securities, moneys, or other property forming a part thereof, which are not paid by the Company to the Trustee upon its receiving notice from the Trustee of the levy or assessment of such taxes, shall be charged by the Trustee to the Fund and paid by it from the Fund. The Trustee may assume that any taxes assessed on or in respect of the Fund concerning the levy and assessment of which it has notified the Company are lawfully assessed unless the Company shall in writing advise the Trustee that in the opinion of counsel for the Company, such taxes are unlawfully assessed. In the event that the Company shall so advise the Trustee, the Trustee will, if so requested in writing by the Company, contest the validity of

Exhibit "A"—(Continued)

such taxes in any manner deemed appropriate by it or its counsel, or the Company if it so elects, may itself contest the validity of any such taxes in any manner deemed by it to be appropriate. The expenses of contesting any tax shall be considered as an actual expense of administering the Fund and the provisions of subdivision B of this Article Ninth shall be applicable thereto. The word "taxes" as used in this section shall be deemed to include any interest or penalties that may be levied or imposed in respect of any taxes lawfully assessed.

B. If in any year during which any loan or loans by the Bank to the Trustee are outstanding and unpaid, there shall be no moneys available or which can be made available under the provisions of this agreement or under the terms of any evidence of indebtedness or loan agreement, to pay such compensation, expenses and taxes, the Company agrees to pay to the Trustee a sufficient sum to pay to it such compensation and to reimburse it for such expenses and taxes paid by the Trustee. After the loan or loans above mentioned shall have been paid in full, the Trustee will if requested in writing by the Company, repay to it out of moneys in the Fund all or any part of the moneys advanced by the Company as above provided, providing that such request is made within 12 months after such loan or loans shall have been paid in full.

C. Each year the Company shall determine how much of its actual expenses of administering the Fund shall be borne by the Company and how much of said administrative expenses shall be borne

Exhibit "A"—(Continued)

by the Fund. As to all such expenses which the Company determines shall be borne by the Fund, the Trustee shall reimburse the Company upon written request. No request for such reimbursement shall be made by the Company for administrative expenses incurred more than twelve months prior to the commencement of the calendar year in which such request is made. The Trustee is released from any obligation for inquiring into the correctness of the amount of such expenses.

D. If at the time such request is made, there is an outstanding loan or loans to the Bank and there shall be no moneys available or which can be made available under the provisions of this agreement or under the provisions of any evidence of indebtedness or loan agreement with which to reimburse the Company, such reimbursement shall be deferred until such loan or loans shall have been paid in full, at which time such reimbursement shall be made by the Trustee to the Company out of moneys in the Fund.

E. The terms "moneys available or which can be made available" as used in subparagraphs B. and D. of this Article Ninth and in Article Tenth shall mean moneys in the hands of the Trustee other than moneys which are the proceeds of dividends from J. C. Penney Company stock or contributions from the Company or participants.

Tenth: The Trustee may be removed by the Company at any time upon sixty days' written notice to the Trustee. The Trustee may resign at any time upon sixty days' written notice to the

Exhibit "A"—(Continued)

Company. Upon the expiration of sixty days after service by the Company upon the Trustee of notice of its removal, or upon the expiration of sixty days after service by the Trustee upon the Company of notice of its resignation, all the duties and obligations of the Trustee hereunder, except those specified in this Article Tenth, shall cease. The appointment of a successor trustee shall be made by the Board of Directors of the Company within such sixty-day period. So long as any indebtedness remains outstanding and unpaid to the Bank, any successor trustee hereunder shall be a corporation authorized to accept and execute trusts under the laws of the United States of America, or of the State in which it is incorporated and having a capital and surplus, as shown by its last preceding published report, of at least \$2,000,000. Upon the removal or resignation of the Trustee becoming effective or at such earlier date as may be agreed upon, the Trustee shall convey, transfer and pay over to such successor trustee as shall be designated in writing by the Company, the Fund then constituting the Trust hereunder, providing, however, that such successor trustee shall take said assets subject to any indebtedness and agreements of and pledges by the Trustee then outstanding. It is further provided that if there is no indebtedness to the Bank outstanding and unpaid at the time when such removal or resignation becomes effective, the Trustee is authorized first to reserve such sum of money or property as to it may seem advisable for the payment of its expenses in connection with the

Exhibit "A"—(Continued)

settlement of its account or otherwise and any balance of such reserve remaining after the payment of such expenses shall be paid over to the successor trustee. If at the date when such removal or resignation of the Trustee becomes effective, there shall be any indebtedness to the Bank outstanding and unpaid, and the moneys in the hands of the Trustee available or which can be made available under the provisions of this Agreement or of any evidence of indebtedness or loan agreement shall not be sufficient with which to enable the Trustee to retain all or any part of such reserve, the Trustee shall only have the right to retain towards its reserve any moneys which are available or can be made available under the terms of this Agreement and in lieu of retaining the balance of the reserve as above provided for, shall have the right to require the Company to advance to it the balance of such sum of money as to it may seem advisable for the payment of its expenses in connection with the settlement of its account or otherwise, and the Company agrees to advance to the Trustee such sum of money, and any balance of such reserve remaining after the payment of such expenses shall be repaid to the Company. The removal or resignation of the Trustee shall not become effective until such payment has been made to the Trustee by the Company. The Trustee, upon the removal or resignation becoming effective shall forthwith file with the Company a statement of its accounts and proceedings from the date of the last day of the

Exhibit "A"—(Continued)

period covered by its last preceding account to the effective date of its resignation or removal.

Eleventh: A. Neither the Trustee nor the Company nor any member of the Administrative Committee at any time acting for or on behalf of the Company shall be liable hereunder to participants in the Plan in any respect except for its or his own gross negligence or willful misconduct, and neither the Trustee nor the Company nor any such person shall be liable for any neglect, omission or wrongdoing of any agents employed by them provided reasonable care shall have been exercised in their selection.

B. The Trustee shall not be liable for the proper application to participants in the Plan of any part of the Fund if deliveries of shares of J. C. Penney Company stock and payments from the Fund are made in accordance with the written direction of the Company as herein provided, nor shall the Trustee nor the Company nor any member of the Administrative Committee acting for or on behalf of the Company be responsible for the adequacy of the Fund to meet and discharge any and all payments and liabilities under the Plan.

C. The Trustee shall be fully protected in acting upon any instrument, certificate or paper believed by it to be genuine and to be signed or presented by the proper person or persons and the Trustee shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing, but may accept the same as conclusive

Exhibit "A"—(Continued)

evidence of the truth and accuracy of the statements therein contained.

Twelfth: All persons dealing with the Trustee are released from inquiring into the decisions or authority of the Trustee and from seeing to the application of any shares of stock, securities, moneys or other property paid or delivered to the Trustee.

Thirteenth: In any application to the courts, only the J. C. Penney Company, (not the Administrative Committee), the Trustee and the Bank, while any loan from the Bank to the Trustee remains unpaid, shall be necessary parties and no participant shall be entitled to any notice or process. Any final judgment entered in such an action or proceeding shall be conclusive upon all persons claiming under the Plan or Trust.

Fourteenth: No benefit deliverable, transferable or payable to a participant under the provisions of the Plan, shall be subject in any manner to anticipation, assignment, pledge or charge by any participant in the Plan, and any attempt so to anticipate, assign, pledge, or charge the same shall be void; nor shall any such benefit be in any manner liable for or subject to the debts, contracts, liabilities, or torts of any participant, nor shall any interest of any participant, under the Plan be subject to garnishment, attachment, execution or levy of any kind, except to such extent as may be required by law.

Fifteenth: A. The Trust shall continue until terminated or until the Fund hereunder shall have

Exhibit "A"—(Continued)

been paid out or delivered or distributed in accordance with the provisions hereof. The Company (subject to the provisions of subparagraph F Article Fourth), reserves the right at any time or times by action of the Board of Directors to alter, modify or amend in whole or in part, any or all of the provisions hereof or (subject to the provisions of subparagraph G of Article Fourth) in its discretion at any time, as provided in the Plan, to terminate this trust in whole or in part, provided, however, that under such alteration, modification, amendment or termination, no part of the Fund in the possession of the Trustee, excepting so much of the moneys for which the Company may be reimbursed for expenses of operation of the Plan, shall ever revert to the Company or be diverted to or used for any purposes other than for the exclusive benefit of participants covered by the Plan, but subject always to the rights of creditors of the Trustee, and provided further, that no such alteration, modification or amendment of the provisions hereof shall impose additional duties on the Trustee without its consent.

B. In the event of the termination of this Trust the Fund shall be paid out, delivered and distributed by the Trustee in accordance with directions received by it from the Company but subject always to the rights of creditors of the Trustee; provided further, however, that the Trustee is authorized, subject always, however, to the rights of the Bank, first, to reserve such sum of money or property as to it may seem advisable for the pay-

Exhibit "A"—(Continued)

ment of its expenses in connection with the settlement of its account or otherwise, and any balance of such reserve remaining after the payment of such expenses shall be paid out, distributed and delivered by the Trustee in accordance with directions received by it from the Company.

Sixteenth: All moneys, stock, securities and other property comprising the Fund in the hands of the Trustee shall be subject to any indebtedness owing by the Trustee to the Bank, and said Bank shall have a first and paramount lien upon, and right to be paid out of, the Fund as from time to time constituted, and so long as any part of said indebtedness remains unpaid, no part of the Fund shall be paid or distributed to any one other than said Bank, except that, from time to time so long as there is no default in the payment of any indebtedness of the Trustee to said Bank, (1) a sum or sums not exceeding \$150,000.00 in the aggregate, received by the Trustee from dividends or from contributions of the Company and participants, and a sum or sums not exceeding \$500,000.00 in the aggregate, received by the Trustee as an additional loan or additional loans from said Bank may be distributed or used to pay expenses in connection with the administration of this trust or in connection with any loan or loans from the Bank and (2) an aggregate of not to exceed 10,000 shares of the J. C. Penney Company Common stock, when and if released from the pledge thereof to the Bank, may be distributed to retiring participants.

Seventeenth: The Company represents and de-

Exhibit "A"—(Continued)

clares that the Bank has notice of the terms and provisions of this Agreement of Trust and that the original loan by said Bank is made in part in reliance upon such terms and provisions. The Company agrees that the fact that said Bank has notice of the terms of the Plan shall not in any way affect any of said Bank's rights under this Agreement of Trust, or the notes or loan agreements in connection with the original or future loans by the Bank to the Trustee, whether or not any of the latter three instruments shall be inconsistent with the Plan.

Eighteenth: The Trustee hereby agrees to hold in trust and administer the Fund hereunder subject to all of the terms and conditions hereof.

Nineteenth: This instrument shall be construed and enforced according to the laws of the State of New York, and all the provisions thereof shall be administered according to the laws of said State.

Twentieth: J. C. Penney Company executes this Agreement of Trust, and joins therein, to evidence its consent to the terms and provisions thereof and its agreement to perform the matters and things therein provided to be performed by it.

Twenty-First: This agreement shall be and become effective when and if, within six months after the date of execution hereof, the 200,000 shares of J. C. Penney Company common stock herein referred to shall have been approved for listing on the New York Stock Exchange and the registration thereof under the Securities Exchange Act of 1934

Exhibit "A"—(Continued)

shall have become effective; and otherwise shall be void and of no effect.

In Witness Whereof, this instrument has been executed at New York, N. Y., on the 8th day of July, 1940, effective as of the first day of January, 1940, by J. C. Penney Company, and its corporate seal affixed and attached by its officers thereunto duly authorized and by The Chase National Bank of the City of New York, as Trustee, and its corporate seal affixed and attested by its officers thereunto duly authorized.

(Corporate Seal)

J. C. PENNEY COMPANY

By A. W. HUGHES,
Vice-President

Attest:

A. J. RASKOPF
Secretary

(Corporate Seal)

THE CHASE NATIONAL
BANK OF THE CITY
OF NEW YORK

By W. L. HILDEBURN,
Vice-President

Attest:

E. B. GARDNER
Asst. Trust Officer

Exhibit "A"—(Continued)

State of New York

County of New York—ss.

On this 8th day of July, 1940, before me personally came A. W. Hughes, to me known, who being by me duly sworn, did depose and say: That he resides in New Rochelle, N. Y.; that he is the Vice-President of J. C. Penney Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed to said instrument by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Notary Public, Nassau County No. 501, Certificate filed in New York County Number 535, New York County Register's Number G 334, Commission expires March 30, 1941.

[Seal]

C. W. GEISLER

State of New York

County of New York—ss.

On this 8th day of July, 1940, before me personally came W. L. Hildeburn, to me known, who being by me duly sworn, did depose and say: That he resides in Summit, N. J.; that he is a Vice-President of The Chase National Bank of the City of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument in such corporate seal;

Exhibit "A"—Continued)

that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Notary Public, Nassau County No. 1044, Certificate filed in New York County No. 159, Register's No. 1-N-90, Commission expires March 30, 1940.

[Seal]

WALTER S. NELSON

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK

First Defense

The complaint fails to state a claim against this answering defendant upon which relief can be granted.

Second Defense

I.

Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 1, 3, 4, 5, 7, 8, 9 and 10.

II.

Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 2, except it admits that it is a national banking association organized

under the laws of the United States of America, having its principal office and place of business in the City and State of New York, and that the complaint purports to allege a matter in controversy in excess of \$3,000, exclusive of interest and costs, and admits, on information and belief, that defendant J. C. Penney Company is a corporation incorporated under the laws of the State of Delaware.

III.

Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 6, except it admits that on or about July 8, 1940, it entered into an agreement of trust with defendant J. C. Penney Company, copy of which (with minor typographical corrections) is attached to the complaint as Exhibit A (herein called the "Trust Agreement"), and admits, on information and belief, that on or about March 21, 1940, the stockholders approved and adopted the Profit-Sharing Retirement Plan, (herein called the "Plan"), copy of which is attached to the complaint as Exhibit X.

IV.

Denies each and every allegation contained in paragraph 11, except it admits that on or about August 1, 1940, as Trustee under the Trust Agreement, it bought from defendant J. C. Penney Company 200,000 shares of J. C. Penney Company stock with the entire proceeds of a loan for

\$5,700,000 from Continental Illinois National Bank and Trust Company of Chicago, and that on or about August 8, 1945, in accordance with the terms of settlement of an action instituted by a stockholder of defendant J. C. Penney Company and judicially compromised, defendant The Chase National Bank of the City of New York, as Trustee, paid out of the fund of the Plan an additional \$300,000 towards the purchase price of the 200,000 shares.

V.

Denies each and every allegation contained in paragraph 12, except it admits that on or about January 16, 1946, by reason of a stock split it received two additional shares of J. C. Penney stock for each share held under the Trust Agreement, and that upon receipt of said additional shares it held 578,511 shares of said stock.

VI.

Denies each and every allegation contained in paragraphs 13 and 17, except it refers to the Plan and the Trust Agreement for the terms and provisions thereof.

VII.

Denies each and every allegation contained in paragraphs 14, 15, 16, 18, 19 and 21.

VIII.

Denies each and every allegation contained in paragraph 20, except it admits that it, in conform-

ity with the Trust Agreement, upon receiving written directions from defendant J. C. Penney Company, from time to time made deliveries to defendant J. C. Penney Company of shares of stock transferred into individual names, and admits that it holds at the present date pursuant to the Trust Agreement approximately 519,901 shares of stock of J. C. Penney Company of a present approximate market value of \$34,508,428.88 as of the close of business August 9, 1951.

Third Defense

I.

All present participants in the Plan are indispensable parties.

II.

Plaintiffs have failed to join indispensable parties.

Wherefore, defendant The Chase National Bank of the City of New York demands judgment dismissing the complaint with costs.

/s/ KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ CLARENCE J. YOUNG,

/s/ ANDREW KOERNER,

Attorneys for defendant The Chase National Bank
of the City of New York.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 30, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT J. C. PENNEY
COMPANY

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Present members of the management staff of the defendant J. C. Penney Company who are participants in the Profit-Sharing Retirement Plan referred to in the complaint numbering approximately 1,800 would be adversely affected by the relief sought in the complaint and are indispensable parties to this action and have not been joined as parties.

Third Defense

1. Denies each and every allegation contained in paragraph 1 of the complaint, except admits that plaintiffs bring this action on behalf of themselves, and alleges that the former management staff employees of J. C. Penney Company who were participants in the Profit-Sharing Retirement Plan referred to in the complaint and who did not attain retirement status thereunder number approximately 700.

2. Admits the allegations contained in paragraphs 2, 3, 4 and 5 of the complaint.

3. Denies each and every allegation contained in

paragraph 6 of the complaint except alleges that on March 21, 1940 at the annual meeting of the stockholders of J. C. Penney Company duly called and held, the stockholders approved and adopted the J. C. Penney Company Profit-Sharing Retirement Plan (for Management Staff) (hereinafter sometimes referred to as the Retirement Plan or the Plan) which had been approved by the Board of Directors on December 6, 1939, and further alleges that on or about July 8, 1940 J. C. Penney Company entered into an agreement of trust with the defendant The Chase National Bank of the City of New York, and that the Plan and Trust Agreement, in the form annexed to plaintiff's complaint as Exhibit X and A, were distributed to the eligible members of the management staff of J. C. Penney Company including the plaintiffs on or about July 25, 1940, and that the Retirement Plan became operative, in accordance with its terms, as of January 1, 1940, and further alleges that each eligible member of the management staff of J. C. Penney Company upon becoming a participant in said Plan, including the plaintiff Wells and the plaintiff Albertsen, signed a "Participant's Acceptance Form", true copies of said forms signed by plaintiff Wells and by plaintiff Albertsen being annexed hereto as Exhibit A and Exhibit B, respectively, and further alleges that the Plan was duly amended from time to time by the Board of Directors of the Company, and that a true copy of the

Plan as so amended and as in effect when this action was commenced, is annexed hereto as Exhibit C.

4. Denies each and every allegation contained in paragraph 7 of the complaint, except alleges that approximately 1,725 management staff associates were participants in the Plan at the end of 1940, and further alleges that the Retirement Plan was one of the defendant J. C. Penney Company's incentive plans for its employees.

5. Admits the allegations contained in paragraphs 8 and 9 of the complaint, except alleges that plaintiff Albertsen also made a contribution for the year 1950 in the sum of \$2,356.22, and further alleges that all contributions made by the plaintiff Wells and by the plaintiff Albertsen represented a percentage of their profit sharing compensation consisting of a portion of the profits of the respective stores managed by them (known as Manager's Contract Compensation) and were made in accordance with the terms of the Retirement Plan.

6. Denies each and every allegation contained in paragraph 10 of the complaint, except alleges that former participants in the Retirement Plan made contributions in accordance with the terms of the Plan which were paid over to the defendant, The Chase National Bank of the City of New York, as trustee under said Plan, and that such contributions in the case of each participant who was a store manager represented a percentage of his profit sharing compensation consisting of a portion of the profits of the store managed by him (known as

Manager's Contract Compensation) and that such contributions in the case of each participant who was a central or branch office employee represented a percentage of such participant's profit sharing compensation based on the Company's profits as a whole under the Company's General Office Compensation Plan.

7. Denies each and every allegation contained in paragraph 11 of the complaint, except alleges that on or about August 1, 1940, the Company sold to the defendant, The Chase National Bank of the City of New York, as Trustee under the Agreement of Trust, a copy of which is annexed to plaintiff's complaint as Exhibit A, 200,000 shares of its authorized and unissued stock for \$5,700,000, being \$30 per share (the approximate January 1, 1940, per share book value of the Company's outstanding stock) less adjustment for two dividends of 75c per share each, paid between January 1, 1940 and August 1, 1940 on the Company's outstanding stock; that the quoted price of J. C. Penney Company common stock on August 1, 1940, traded on the New York Stock Exchange, was \$80 per share; that the Company received the \$5,700,000 from the Trustee for the 200,000 shares of stock from the proceeds of a loan in that amount made by the Trustee from Continental Illinois National Bank & Trust Company of Chicago; that on or about August 8, 1945, in accordance with the terms of the settlement of an action instituted by a stockholder of the Company and judicially compromised, the

Company received from the Trustee of the Fund under the Plan an additional \$300,000 toward the purchase price of the 200,000 shares, representing the aforesaid adjustment for dividends in the purchase price, and the payment of such \$300,000 from the Fund by the Trustee was charged against the dividend account of the Fund of the Plan.

8. Denies each and every allegation contained in paragraph 12 of the complaint except alleges that in 1946 J. C. Penney Company stock was split 3 for 1 and on January 16, 1946 there were issued to each stockholder, including the Trustee of the Plan, two additional shares for each share held with the result that beginning with the Plan's operations for 1946, as provided in Article 6 of the Plan, each reference in the Plan and Trust Agreement to a number of shares of stock is to be read as though stated in the increased number of shares resulting from the split-up, and that The Chase National Bank of the City of New York as Trustee of the Plan held, immediately following the issuance on January 16, 1946, 578,511 shares of stock of J. C. Penney Company.

9. Denies each and every allegation contained in paragraph 13 of the complaint except alleges that, pursuant to the terms of the Retirement Plan, the Company has made and makes annual contributions of two types to the Fund under the Plan, one contribution, based on the profits of the Company, being credited to the accounts of the participants, and the other, which is an amount equal to 2% of

the salaries of employees receiving compensation as defined in the Plan, being applied toward the cost of the shares of J. C. Penney Company stock purchased by the Trustee of the Plan, and that the plaintiffs and each of the other participants in the Plan upon leaving the employ of the Company received all the benefits due them under the terms of the Plan.

10. Denies each and every allegation contained in paragraphs 14, 15, 16, 17, 18 and 19 of the complaint.

11. Denies each and every allegation contained in paragraph 20 of the complaint except alleges that the defendant The Chase National Bank of the City of New York has from time to time during the period from July 1, 1945 to date at the direction of the Administrative Committee of the Plan made deliveries of stock from the shares of J. C. Penney Company stock held by it as trustee under the Plan to participants entitled thereto under the terms of the Plan by reason of having served in the employ of the Company to retirement age of 60, and further alleges that the defendant The Chase National Bank of the City of New York as trustee under the Plan has in its possession 519,901 shares of J. C. Penney Company stock, and further alleges that on the 12th day of July, 1951, the date on which the complaint in this action was served, the quoted closing price of J. C. Penney Company stock on the New York Stock Exchange was \$68.25 per share.

12. Denies each and every allegation contained in paragraph 21 of the complaint.

Fourth Defense

The United States Treasury Department on or about November 12, 1940 issued a ruling that the Plan met the requirements of Section 165 of the Internal Revenue Code and therefore qualified as an employees' trust entitled to exemption from Federal income tax, a true copy of which ruling is annexed hereto as Exhibit D. Subsequent to the amendment of said Section 165 by the Revenue Act of 1942 the Treasury Department on or about December 21, 1944 issued a ruling that the Plan met the requirements of Section 165(a) of the Internal Revenue Code as amended and therefore qualified as an employees' trust entitled to exemption from Federal income tax, a true copy of which ruling is annexed hereto as Exhibit E. The Treasury Department has also determined that amendments to the Plan submitted to it from time to time did not affect the Plan's continued qualification as an employees' trust entitled to exemption from Federal income tax under Section 165(a) of the Internal Revenue Code, as amended.

Fifth Defense

The claims of plaintiffs Wells and Albertsen and all others whom they purport to represent are barred by estoppel.

ing retirement status, whose contributions and earnings were used in the acquisition of the J. C. Penney Company stock purported to be held in trust by the Trustee.

Plaintiffs contend "that the trust purported to be established with respect to the shares of J. C. Penney Company stock is illegal and void in that the same constituted, with respect to such stock, a lottery. Plaintiffs pray that all such shares of stock which are held by the Trustee at the time of the entry of a decree in this action be declared to be held under a resulting trust in favor of plaintiffs and those for whom plaintiffs have instituted this action whose contributions and earnings were used in the acquisition of and payment for such shares of stock; and also plaintiffs contend that such decree should provide that a resulting trust exists in favor of participants now in the Plan whose funds were used in the acquisition and payment for said shares of stock the respective interests of all such persons, being the plaintiffs and those for whom they prosecute this action and such other present participants, to be in the proportion that the contributions and earnings of each such person bear to the total contributions and earnings of all such persons which were used in the acquisition and payment for said shares of stock."

Defendants deny that plaintiffs are entitled to any relief and assert the validity of the Plan and Trust.

For the purposes of brevity and convenience, the

following are generally referred to in this Pre-Trial Order in the following manner:

A. Defendant J. C. Penney Company is referred to as "Penney Company."

B. Defendant The Chase National Bank of the City of New York is referred to as "Chase Bank."

C. Continental Illinois National Bank and Trust Company of Chicago is referred to as "Continental Bank."

D. (1) J. C. Penney Company Profit-Sharing Retirement Plan (for Management Staff) as distributed to participants in 1940 is set forth on pages 21 to 36, both inclusive, of Ex. 125, and as amended from time to time is referred to as the "Profit-Sharing Retirement Plan" or "Plan." The Trust Agreement forming part of the Plan, as adopted in 1940, is set forth on pages 37 to 50, both inclusive, of Ex. 125, and as amended from time to time is referred to as the "Trust Agreement."

(2) The term "compensation" as used in said Plan is defined on page 21 of Ex. 125, as follows:

"The term 'compensation' as used herein means the amount received by an employee of J. C. Penney Company under contract as a portion of the profits of the store managed by him, or the amount received by a central or branch office employee as his or her share of the General Office Compensation Fund, as the case may be, and excludes regular salary. If so determined by the Administrative Committee, it may also include other compensation than that specified above, apart from regular salary, based on

profits received by employees of J. C. Penney Company."

(3) The term "participant" as used in said Plan and in this Pre-trial Order means the eligible employees specified in Article 3 of said Plan on page 24 of Ex. 125, as follows:

"the following classes of employees of the Company and of any wholly owned subsidiary shall be eligible to participate in the Plan:

store managers and central and branch office employees who have a contract entitling them to receive compensation as hereinbefore defined, which includes store managers, buyers, employees holding positions of responsibility in the central and branch offices of the company, and executives, including those who are directors, but excluding those who serve as directors only. It shall also include employees holding positions of responsibility in any wholly owned subsidiary determined by the Administrative Committee to be eligible. It shall also include any other classes of employees entitled to receive compensation who may be determined by the Administrative Committee at any time to be eligible.****"

E. J. C. Penney Company Profit-Sharing Retirement Plan (for Management Staff) Administrative Committee is referred to as "Administrative Committee."

F. Stockholders of J. C. Penney Company are referred to as "Stockholders."

G. Directors of J. C. Penney Company are referred to as "Directors."

H. The term "associate" as used by the Penney Company has the same meaning as the term "employee."

Stipulation Re Statement of Agreed Facts

The matters set forth in this Statement of Agreed Facts are agreed by all parties to be true and shall be considered as evidence for all purposes; and wherever in this Statement of Agreed Facts reference is made to an exhibit, such exhibit in its entirety is to be considered a part of the Statement of Agreed Facts and shall be considered as evidence for all purposes; provided, however, that any of such facts and any of such exhibits shall be subject to any objection upon the ground of irrelevance or immateriality which any party may set forth in this Pre-trial Order, or assert at the trial and that this Statement of Agreed Facts shall not constitute a bar to any party's urging any legal contention made by such party in this Pre-trial Order, and provided further that where an exhibit heretofore mentioned is to be considered as evidence for all purposes, such circumstance shall not bar the right of any party to urge in this Pre-trial Order or assert at the trial that only a portion or portions of such exhibit or exhibits are relevant or material.

Statement of Agreed Facts

1.

Plaintiff Harvey L. Wells is, and at the time of instituting this action was, a citizen of the United States and a citizen and resident of the State of Oregon.

2.

Plaintiff Harry J. Albertsen is, and at the time of instituting this action was, a citizen of the United States and a citizen and resident of the State of California.

3.

Defendant Penney Company is, and at all times since 1924 has been, a corporation organized and existing under the laws of the State of Delaware.

4.

Defendant Chase Bank is, and at all times herein referred to has been, a national banking association organized and existing under the laws of the United States of America, having its principal office and place of business in the City and State of New York.

5.

The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

6.

Continental Bank is, and at all times herein referred to has been, a national banking association

organized and existing under the laws of the United States of America, having its principal office and place of business in the City of Chicago, State of Illinois.

7.

The business of the Penney Company consists and has consisted of the distribution at retail of wearing apparel for men, women and children, and of dry goods and home furnishings at low and medium prices through a chain of stores situated throughout the United States. At the end of 1948, the last year plaintiff Wells was employed by the Penney Company, it had 1,601 stores located in small, medium and large size communities in the 48 states, each store being managed by one associate. At the end of 1950, the last full calendar year plaintiff Albertsen was employed by the Penney Company, it had 1,612 stores. At the end of 1953 the Penney Company had a total of 1,634 stores located in the 48 states, of which 42 stores were located in the State of Oregon.

8.

The Penney Company is the outgrowth of one small store opened in 1902 in Kemmerer, Wyoming, by James C. Penney, who is presently Chairman of the Board of Directors. The business was conducted through a group of affiliated partnerships until January 16, 1913, when a Utah corporation named J. C. Penney Company was formed which took over the business of and became the successor to this group of affiliated partnerships. The defend-

ant Penney Company was incorporated under the laws of the State of Delaware on December 24, 1924, and on January 1, 1925, it took over the business of and became the successor to the Utah corporation. Since 1914 the executive offices of the Penney Company and its predecessor company have been in and are now in New York City.

9.

J. C. Penney Company, the Utah corporation organized in 1913, succeeded to the assets and assumed the obligations of the previous partnerships. The stock which was issued by that corporation was termed "classified stock," a separate class of stock having been issued for each store. Each former partner received in place of his partnership interest in a store an equivalent portion of the Utah corporation's classified stock relating to that store which entitled him to profits resulting from the store's operations, payable in dividends, as declared by the corporation. In 1919 preferred stock of the Utah corporation was issued to the public and listed on the New York Stock Exchange.

When J. C. Penney Company, the Delaware corporation, was incorporated, classified stock interests of the Utah corporation were reissued in the form of classified stock of the Delaware corporation. Managers continued to hold this classified stock. Provision was made in the Delaware corporation's charter for the conversion of the classified stock interests of persons other than Store Managers into

the Delaware corporation unclassified common stock and Class A preferred stock (in 1927 termed common stock and preferred stock, respectively), the conversion to take place as the stores for which the classified stock was issued qualified on the basis of earnings, or in any event by not later than December 31, 1931. The Class A preferred stock was retired by 1935. First preferred stock of the Delaware corporation, retired by 1927, was also issued in place of the preferred stock of the Utah corporation.

At a stockholders' meeting held on February 21, 1927, a resolution providing for amendments to the Certificate of Incorporation was adopted by the unanimous vote of all common stockholders, present in person or by proxy (Ex. 161).

The amendments to the Certificate of Incorporation provided in substance for the conversion of the classified common stock held by managers. All such stock owned by a manager, except the stock of the store which he managed, was converted into common stock and preferred stock. For the classified common stock owned by a manager in the store managed by him a manager received preferred stock equal in value to the value of capital and surplus applicable to his classified shares, and a contract, known as a "Manager's Conversion Contract," entitling him to the same proportion of his store's earnings to which he was entitled under his classified common stock, and the right to purchase at book value, on ceasing to manage his store, common stock which, on the basis of its previous

year's earnings, would earn for him two-thirds of the preceding three-year average earning power under his contract.

In 1929 the Company's Certificate of Incorporation was amended to provide for the calling in of all outstanding Manager's Conversion Contracts and for each manager, on surrendering his contract, to purchase at its book value a number of shares of common stock of the Company as though he had given up the management of his store on December 31, 1928. All conversion contracts were so surrendered.

Commencing with 1929, the Company has issued to each manager a contract entitling him to a specified percentage of the yearly profits his store produces.

At the stockholders' meeting of February 21, 1927, provision was made for the setting up of a general office compensation plan under which, since 1927, executives, buyers and others holding responsible positions in the central and branch offices of the Company have received profit-sharing remuneration based on the profits of the Company as a whole.

In accordance with the action taken at the above mentioned stockholders' meeting, managers and central and branch office associates who qualified were permitted to invest in common stock of the Company when offered for sale by the Company for expansion purposes. Such sales were made in the years 1927, 1928, 1929, 1930 and 1937. In 1935 the Company sold to eligible associates shares of

its common stock which it had acquired on the market in previous years and had held in its treasury.

Sales of stock of the Company were also made in 1925 and 1926 to eligible associates of the Company.

These sales made in the years 1925, 1926, 1927, 1928, 1929, 1930, 1935 and 1937 were in the actual number of shares set out below in the second column opposite the year and which shares for years prior to 1930 would represent in 1940 the number of shares of the present stock set out below in the third column opposite the year:

Year	Actual Shares Sold	Shares Adjusted to 1940 Stock
1925	2,120	63,600
1926	1,190	35,700
1927	18,538	55,614
1928	20,110	60,330
1929	18,607	55,821
1930	49,207	49,207
1935	40,000	40,000
1937	75,000	75,000

10.

In 1927 the common stock of the Penney Company was split ten for one by issuing to the holder of record of each share of common stock ten shares in return for each share held.

In 1929 the Company issued warrants giving each holder of record of its common stock the right to purchase for each share held two additional shares at \$7 per share.

In 1945 the common stock of the Company was split three for one and accordingly on January 16,

1946 there were issued to each stockholder of record two additional shares for each share held. As a result, the Trustee of the Plan thereupon held 578,511 shares of stock of the Company and beginning with the Plan's operations for 1946, as provided in Article 6 of the Plan, each reference in the Plan and Trust Agreement to a number of shares of stock is to be read as though stated in the increased number of shares resulting from the split-up. The number of shares held by the Trustee on December 31, 1953 was 483,754.

11.

The connections with Penney Company and its predecessors of the persons who since 1939 have served as officers or directors are as follows:

J. C. Penney:

Founded business in 1902

Elected Director, President and General Manager upon incorporation of company in Utah in 1913 and Chairman of the Board in 1917

Elected Director and Chairman of Board when Delaware corporation succeeded Utah corporation January 1, 1925

Honorary Chairman of Board 1946-1951

Chairman of Board 1951-

Earl C. Sams:

Started with company in 1907

Director of Utah corporation 1913-1925

First Vice President 1913-1917

President 1917-1924

Elected Director and President when Delaware corporation succeeded Utah corporation January 1, 1925

Member Operating Committee from January 1, 1943, to April 20, 1946

President until 1946 when elected Chairman of Board, served in that capacity until death on July 23, 1950

John I. H. Herbert:

Started with company in 1911

Director and Treasurer of Utah corporation 1913-1924

Secretary 1913-1917

Elected Director and Treasurer when Delaware corporation succeeded Utah corporation January 1, 1925

Third Vice President 1926-1945

Retired under Retirement Plan as Third Vice President and Treasurer July 1, 1945

Continues to serve as Director

Member Operating Committee from January 1, 1943, to July 1, 1945

Member Administrative Committee from inception of Plan to July 1, 1945

George H. Bushnell:

Started with company in 1911

Director of Utah corporation 1916-1924

Assistant Secretary and Assistant Treasurer 1917-1920

First Vice President and Comptroller 1920-1924

Elected Director, First Vice President and Comptroller when Delaware corporation succeeded Utah corporation January 1, 1925

Resigned Comptrollership in 1926, First Vice Presidency in 1930 and as Director July 1, 1947

Wilk Hyer:

Started with company in 1910

Director of Utah corporation 1918-1924

Vice President 1918-1920

Elected Director when Delaware corporation succeeded Utah corporation January 1, 1925

Resigned as Head of Shoe Department in July 1929

Continues to serve as Director

Lew V. Day:

Started with company in 1912

Elected Director in 1926

Appointed Head of Personnel Department in 1927

Elected First Vice President in 1930

Resigned as Head of Personnel and First Vice President June 30, 1937, and as Director November 27, 1945

Glyndon H. Crocker:

Started with company in 1920 as Director and General Manager of a wholly owned subsidiary, Crescent Corset Company, Inc.

Elected President of Crescent Corset Company, Inc., on June 3, 1930

Elected Director of parent company in 1926

Served in these capacities until his death on August 2, 1945

Walter A. Reynolds:

Started with company in 1923

Appointed Sales Manager in 1929

Elected Director and Second Vice President in 1930, Executive Vice President in 1946

Retired under Retirement Plan as Sales Manager and Executive Vice President on July 1, 1947, and resigned as Director on that date

Member Operating Committee from January 1, 1943, until July 1, 1947.

Earl A. Ross:

Started with company in 1916

Appointed Real Estate Manager in 1928

Elected Director in 1930

Retired under Retirement Plan as Real Estate Manager July 1, 1945

Continues to serve as Director

Member Operating Committee from January 1, 1943, to July 1, 1945

Albert W. Hughes:

Started with company in 1920

Appointed Assistant to the President in 1929

Elected Director in 1933

Elected Vice President and appointed Head of Personnel Department in 1937

Gave up duties as Head of Personnel Department in 1940

Elected Executive Vice President in 1943, President in 1946

Reached retirement status under Retirement Plan on July 1, 1951

Continues to serve as President and Director

Member Operating Committee from January 1, 1943, to present time

Member Administrative Committee from inception of Plan to April 20, 1953

Frederick W. Binzen:

Started with company in 1926

Appointed Merchandise Manager in 1929

Elected Director in 1935

Elected Third Vice President in 1945, Second Vice President in 1946 and Executive Vice President in 1947

Retired under Retirement Plan as Executive Vice President and Merchandise Manager on July 1, 1950

Continues to serve as Director

Member Operating Committee from January 1, 1943, to July 1, 1950

Member Administrative Committee from inception of Plan to July 1, 1950

Frederick A. Bantz:

Started with company in 1922

Elected Director November 27, 1945

Elected Vice President and appointed Merchandise Manager on July 1, 1950

Presently serving in above capacities

Member Operating Committee since July 1, 1950

Member Administrative Committee since July 1, 1950

John F. Brown:

Started with company in 1921

Elected Director November 27, 1945

Appointed Real Estate Manager July 1, 1945

Elected Third Vice President July 1, 1947, and Vice President July 1, 1950

Presently serving as Director, Vice President and Real Estate Manager

Member Operating Committee since July 1, 1945

George E. Mack:

Started with company in 1921

Elected Treasurer July 1, 1945, and Third Vice President in 1946

Elected Director and Second Vice President July 1, 1947, and Executive Vice President July 1, 1950.

Presently serving as Director, Executive Vice President and Treasurer

Member Operating Committee since July 1, 1945

Member Administrative Committee since July 1, 1945

Herbert H. Schwamb:

Started with company in 1923

Appointed Head of Personnel Department in 1940

Elected Director July 1, 1947, and Vice President July 1, 1950

Member Operating Committee since January 1, 1943, to present time

Member Administrative Committee from inception of Plan to present time

Presently serving in above capacities

Homer F. Torrey:

Started with company in 1919

Appointed Sales Manager July 1, 1947

Elected Vice President July 1, 1950

Elected Director December 5, 1950

Member Operating Committee since July 1, 1947

Presently serving in above capacities.

August J. Raskopf:

Started with company in 1919

Elected Secretary January 1, 1932 and serves in that capacity

Never a Director

Richard W. Trown:

Started with company in 1914

Elected Comptroller in 1929

Resigned as Comptroller November 30, 1945

Member Operating Committee from January 1, 1943, to November 30, 1945

Member Administrative Committee from inception of Plan until November 30, 1945

Never a Director

Died December 15, 1951

Robert C. Weiderman:

Started with company in 1916

Elected Comptroller November 30, 1945, and serves in that capacity

Member Operating Committee from December 1945

Member Administrative Committee since December 3, 1945

Never a Director

12.

On March 10, 1930, the stockholders adopted, with reference to the Operating Committee of the Penney Company, Article XIX of the By-Laws as set forth on the first page of Ex. 156, which continued in effect until September 2, 1942. On September 2, 1942, the Directors amended said Article XIX of the By-Laws so as to read as set forth on the second page of Ex. 156, and as so amended said Article XIX continued in effect after said date.

13.

During each of the following years the following persons were members of and served as members of the Operating Committee, and, if a change occurred during such year, such member was succeeded on the date stated by the person set out in the note below such year:

Members of Operating Committee

Year 1943: E. C. Sams, J. I. H. Herbert, W. A. Reynolds, E. A. Ross, A. W. Hughes, F. W. Binzen, R. W. Trown and H. H. Schwamb.

Year 1944: Same as 1943.

Year 1945: Same as 1943. Note: On July 1, 1945,

J. F. Brown succeeded E. A. Ross and George E. Mack succeeded J. I. H. Herbert; and in December, 1945 R. C. Weiderman succeeded R. W. Trown.

Year 1946: E. C. Sams (until April 20), A. W. Hughes, W. A. Reynolds, F. W. Binzen, George E. Mack, H. H. Schwamb, J. F. Brown and R. C. Weiderman.

Year 1947: A. W. Hughes, W. A. Reynolds, F. W. Binzen, George E. Mack, H. H. Schwamb, J. F. Brown and R. C. Weiderman. Note: As of July 1, 1947, W. A. Reynolds retired and was succeeded by H. F. Torrey.

Year 1947: A. W. Hughes, F. W. Binzen, George E. Mack, H. H. Schwamb, J. F. Brown, R. C. Weiderman and H. F. Torrey.

Year 1949: Same as 1948.

Year 1950: Same as 1948. Note: F. W. Binzen retired as of July 1, 1950, and was succeeded by F. A. Bantz.

Year 1951: A. W. Hughes, George E. Mack, H. H. Schwamb, J. F. Brown, R. C. Weiderman, H. F. Torrey and F. A. Bantz.

14.

At their meeting held on December 5 and 6, 1939, the Directors elected the following persons to serve as members of the Administrative Committee: J. I. H. Herbert, F. W. Binzen, R. W. Trown, A. W. Hughes and H. H. Schwamb.

Said persons continued to serve until July 1, 1945, when George E. Mack was appointed by the

Directors to succeed J. I. H. Herbert who retired under the Plan on that date.

Said persons served as such until December 3, 1945, when the Directors appointed R. C. Weiderman to succeed R. W. Trown who had resigned as Comptroller.

Said persons continued to serve until July 1, 1950, when F. A. Bantz was appointed to succeed F. W. Binzen who retired under the Plan on that date.

Said persons continued to serve thereafter except that on April 20, 1953, W. M. Batten was appointed to succeed A. W. Hughes who resigned on that date.

15.

The stockholders of defendant Penney Company at the annual stockholders meetings held on the dates shown below elected the persons whose names appear opposite the date of such meeting as directors, and such persons served as directors until the next annual stockholders meeting, unless otherwise stated in a note below the date of such meeting; and, if a vacancy is stated in such note to have occurred, such vacancy did occur, and the person stated in such note to have been elected to fill the vacancy was so elected, and the vacancy was filled by the election of the successor as therein stated, and such successor served as a director until the next annual meeting of the stockholders.

Date of Annual Stockholders Meeting: March 21, 1939. Directors Elected: J. C. Penney, E. C. Sams, J. I. H. Herbert, George H. Bushnell, Wilk Hyer,

G. H. Crocker, Lew V. Day, W. A. Reynolds, A. W. Hughes, Earl A. Ross and F. W. Binzen.

March 21, 1940: Same persons as elected in 1939.

April 20, 1941: Same persons as elected in 1939.

April 20, 1942: Same persons as elected in 1939.

April 20, 1943: Same persons as elected in 1939.

April 20, 1944: Same persons as elected in 1939.

April 20, 1945: Same persons as elected in 1939.

Note: On November 27, 1945, F. A. Bantz and J. F. Brown were elected directors for the unexpired terms of G. H. Crocker who died on August 2, 1945, and Lew V. Day who resigned on November 27, 1945.

April 20, 1946: J. C. Penney, E. C. Sams, J. I. H. Herbert, George H. Bushnell, Wilk Hyer, W. A. Reynolds, Earl A. Ross, A. W. Hughes, F. W. Binzen, F. A. Bantz and J. F. Brown.

April 21, 1947: Same persons as elected in 1946.
Note: George E. Mack and H. H. Schwamb were elected directors on June 17, 1947, for the unexpired terms of George H. Bushnell and W. A. Reynolds who resigned as directors as of July 1, 1947.

April 20, 1948: J. C. Penney, E. C. Sams, J. I. H. Herbert, Wilk Hyer, Earl A. Ross, A. W. Hughes, F. W. Binzen, F. A. Bantz, J. F. Brown, George E. Mack and H. H. Schwamb.

April 20, 1949: Same persons as elected in 1948.

April 20, 1950: Same persons as elected in 1948.

Note: H. F. Torrey was elected a director on De-

cember 5, 1950, to fill the unexpired term of E. C. Sams who died on July 23, 1950.

April 20, 1951: J. C. Penney, J. I. H. Herbert, Wilk Hyer, Earl A. Ross, A. W. Hughes, F. W. Binzen, F. A. Bantz, J. F. Brown, George E. Mack, H. H. Schwamb and H. F. Torrey.

16.

Plaintiff Harvey L. Wells was with the Penney Company from 1919 to 1923, when he left its employment. He rejoined the Company in 1929 as a section head in Portland store No. 217, until he was appointed manager of Portland Store No. 499 in 1933. In 1935 he was transferred from Store No. 499 to become manager of the Streator, Illinois, store, where he remained until 1944. In 1944 he became manager of the Corvallis, Oregon, store.

Plaintiff Harry J. Albertsen entered the employ of Penney Company in 1925 as a salesman in the Taft, California, store, where he remained until the fall of 1926, when he became a salesman in the new Hanford, California, store. He remained in that capacity until October, 1930, when he was made manager of the Van Nuys, California, store No. 525. On July 1, 1934, he became manager of East Los Angeles store No. 925, continuing in that capacity until he was discharged effective December 31, 1950.

17.

On or about November 24, 1939, R. W. Trown, then Comptroller of Penney Company, submitted

to the directors a communication and attachments (Ex. 123) with reference to the establishment of a profit-sharing retirement plan. Said communication and attachments were considered by the directors at their meeting held on December 5 and 6, 1939.

18.

At a meeting held on December 5 and 6, 1939, the Board of Directors of the Penney Company adopted the Profit-Sharing Retirement Plan subject to approval of the stockholders of the Company and to its completion in final form (Ex. 2).

19.

Under date of December 26, 1939 Penney Company caused to be mailed to managers and central and branch office executives, including plaintiffs, a letter of E. C. Sams, then President of the Company, (Ex. 128) as follows:

“President’s Office
New York, N. Y.
December 26, 1939.

“To the Managers and Central Office Executives:

“As you all know, it has been the unwritten policy of our company occasionally, when circumstances seemed to warrant it, to issue shares of its common stock to eligible executives and store managers. The number of shares, the price, and the time of issuance, depended in a general way on the development of the company. The purpose of that policy was to create incentive through ownership

participation in the profits of the company and, also, to assist participants in building for themselves and their families a security against advanced age and often its incidental dependency. It is questioned by the company's Board whether that policy in recent years has met the purposes intended.

"The Board feels strongly however, that the advisability of attaining the purposes mentioned still exists. It recognizes that ownership participation has played a part in the development of our company. It also believes that distinct benefit will be gained to associates and to the company by assisting associates in building a security against old age dependence. This is being widely recognized in all competitive fields because of the growing need for making room on management staffs for younger associates who may contribute quicker recognition and faster development of new and modern merchandising techniques.

"Accordingly, a profit-sharing and retirement plan has been devised after much thought and study, which it is believed in large measure will in time meet the situation. This plan has been considered and approved by the Board of Directors. The adoption of the plan, however, is strictly subject to the stockholders' approval, which cannot be obtained before the next annual meeting, March 21, 1940.

"If the plan is adopted, it will become operative as at January 1, 1940. The plan provides, among

other things, for withholding a 20% portion of compensation due to all managers and central and branch office executives in any year. This will become part of the manager's and executive's savings under the plan. The company will also make certain contributions to the fund set up under the terms of the plan. While the plan does not require withholding of compensation until earnings for 1940 are due, which would ordinarily be paid early in 1941, it will permit deposits up to one-third of 1939, compensation payable early in 1940. In those cases where one-third of compensation is less than \$500.00, deposit privilege will be extended permitting deposit from compensation to \$500.00. In other words, managers may voluntarily deposit from their 1939 compensation, but there will be no compulsion as to any deposit until the 1940 compensation is paid, early in 1941.

"The plan, if adopted, will not cover any associates other than store managers with contracts and general office associates included in the General Office Compensation Fund. Therefore, men approved as 'ready-to-manage', and participants in 'large' store pools, will not be included under this plan.

"This makes it necessary to revise all managers' contracts as of December 31, 1939. You will be advised about your 1940 contract just as soon as possible after the stockholders' decision is known. This brief information about the new plan, coming to you now, will permit you to arrange your personal affairs, taking into consideration the possible adop-

tion of the plan and subsequent reduction in your immediate cash income from compensation. Furthermore, we feel sure that when you finally have an opportunity to go over the details of the plan you will recognize that its liberality will make it highly profitable for you to voluntarily deposit a portion of your compensation for 1939.

“Full information regarding the details of the plan will be made available to you when all legal points as to its adoption can be worked out.

“I am indeed happy to be able to advise you of this step. For years we have been seeking a better and more constructive way by which the managers and executives of today and tomorrow might share in the development of this company. Now, after a year of intensive study, a plan has been developed that appears not only sound from the viewpoint of the stockholder but exceedingly attractive to every man in the management group. I am so enthusiastic about the new plan that it seems to me 1939 will take its place as one of the greatest years in our company's history. In my judgment, through the adoption of the ‘Thrift’ plan for associates outside the management group, and through the development of this plan for managers and executives, we have added new strength to the Penney Company and paved the way for even greater progress in the years ahead.

Sincerely,
E. C. Sams”

20.

On or about February 24, 1940, there was mailed to managers and central and branch office associates a letter of E. C. Sams, then President of the Company, (Ex. 244) enclosing the associate's check for his 1939 compensation, advising that if the profit-sharing retirement plan was approved by stockholders, eligible participants would be privileged to deposit up to one-third of their 1939 compensation, and asking the associate to return a check for such portion of the amount of the enclosed check as he wished to deposit. Plaintiffs received counterparts of this letter.

21.

On or about February 29, 1940, there was mailed to each stockholder of the Penney Company, including the plaintiffs, a document (Ex. 55) consisting of a letter of E. C. Sams, then President of the Penney Company, a notice of the annual meeting to be held on March 21, 1940 and a proxy statement containing a summary of the Retirement Plan. The purpose of the meeting was to elect directors and to consider and vote upon the approval and adoption of the Retirement Plan.

22.

Plaintiff Wells executed and returned to the Company the proxy (Ex. 245) sent to him with Ex. 55 conferring authority upon his proxies to vote for approval and adoption of the proposed Retirement Plan. Plaintiff Albertsen did not return his proxy.

23.

The annual meeting of the stockholders was held on March 21, 1940. At said meeting there was presented a copy of said Plan in its then form (Ex. 1-A). At the meeting the stockholders adopted resolutions approving and adopting the Plan effective as of January 1, 1940 (Ex. 1). Plaintiff Wells' shares were voted for such approval and adoption. The Plan has been continuously in effect since the date of its adoption.

24.

In the proxy statement for the annual meeting of the stockholders on March 21, 1940 (Ex. 55), it was stated that upon their approval and adoption of the proposed Plan it was the intention of the Board of Directors to adopt for the salaried employees of the Company the retirement policy set forth in the proxy statement and such retirement policy was adopted by the Board of Directors by resolution on April 23, 1940 (p. 1322 of Ex. 3), and was included as Article 8 of the Plan (pp. 27-28 of Ex. 125).

25.

In the form in which the Plan was adopted by the stockholders (Ex. 1-A) a participant was required to contribute 20% of his compensation for each year beginning with the year 1940 and was permitted to contribute up to 33 $\frac{1}{3}$ %. On May 28, 1940 the Board of Directors of the Penney Company adopted a resolution amending the Plan so that each participant was required to contribute 33 $\frac{1}{3}$ % of his compensa-

tion for each year beginning with the year 1940 (Ex. 4).

26.

On July 8, 1940 the Board of Directors of the Penney Company adopted a resolution approving the Plan with changes made since its meeting of December 5 and 6, 1939, and approving and authorizing the execution of the agreement of trust to be entered into with the Chase Bank as Trustee of the Plan (Ex. 7). On the same date the Trust Agreement was entered into by the Penney Company and the Chase Bank as Trustee (pp. 37-50 of Ex. 125), and the Chase Bank has at all times since July 1940 acted as Trustee under the Plan. The Plan and Trust Agreement, as so approved and entered into, are set forth on pp. 21-50 of Ex. 125. At all times herein concerned, the trust property which is the subject of this action and the place of administration of the trust and of the Plan have been and are now located in the city, county and state of New York.

27.

A. On August 1, 1940, in accordance with the provisions of the Plan and Trust Agreement, the Penney Company sold to the Chase Bank, as Trustee of the Retirement Plan, 200,000 shares of its authorized and unissued stock and delivered certificates for the 200,000 shares to the Chase Bank. The Chase Bank, as Trustee, paid the Penney Company on the same day the purchase price of \$5,700,000, which was at the rate of \$28.50 per share, being \$30 per

share (the approximate January 1, 1940, per share book value of the Company's outstanding stock) less adjustment for two dividends of 75c each paid between January 1, 1940 and August 1, 1940. The purchase price of \$5,700,000 was paid with the proceeds of a loan in the sum of \$5,700,000 made by the Continental Illinois National Bank & Trust Company of Chicago to the Chase Bank as Trustee of the Retirement Plan to enable the Chase Bank to purchase the stock. The loan was made pursuant to an agreement executed by the Continental Bank, the Chase Bank as Trustee, and the Penney Company (Ex. 210), and a note evidencing the loan was executed by the Chase Bank as Trustee (Ex. 211), (Article 5 of the Plan, p. 24 of Ex. 125; Article Fourth of the Trust Agreement, pp. 39-41 of Ex. 125). On or about August 8, 1945, in accordance with the terms of the settlement of an action instituted by a stockholder of the Company and judicially compromised, the Company received from the Trustee of the Fund under the Plan \$300,000 as an addition to the purchase price of \$5,700,000 paid for the 200,000 shares, representing the aforesaid adjustment for dividends in the purchase price, and the payment of such \$300,000 from the Fund by the Trustee was charged against the dividend account of the Fund of the Plan (pp. 1559-63 of Ex. 23).

B. The following shows the closing prices of J. C. Penney Company stock upon the New York Stock Exchange upon the dates stated (the stock being split 3 for 1 on January 16, 1946) :

	Date	Price
Jan. 1 a	12/30/39	94 $\frac{1}{2}$
holiday	1/2/40	94 $\frac{1}{2}$
	8/1/40	80
	3/1/41	76 $\frac{3}{4}$
March 1 a	2/28/42	68 $\frac{3}{4}$
holiday	3/2/42	68 $\frac{1}{4}$
	3/1/43	84 $\frac{1}{2}$
	3/1/44	96 $\frac{3}{4}$
	3/1/45	111
	3/1/46	53$\frac{1}{2}$
	3/1/47	43 $\frac{7}{8}$
	3/1/48	37 $\frac{7}{8}$
	3/1/49	44 $\frac{7}{8}$
	3/1/50	60 $\frac{1}{2}$
	3/1/51	70
	3/1/52	68 $\frac{3}{8}$
March 1 a	2/27/53	68 $\frac{7}{8}$
Sunday	3/2/53	68

C. The following shows the “high” and “low” prices at which J. C. Penney Company common stock was quoted on the New York Stock Exchange for each month during the period August 1, 1940 through December 31, 1953:

**Record of Monthly 'High' and 'Low' Sales Prices* of
J. C. Penney Company Common Stock on New York Stock
Exchange for Months of August 1940 through December 1953**

119

<u>Jan.</u>	<u>Feb.</u>	<u>Mar.</u>	<u>Apr.</u>	<u>May</u>	<u>June</u>	<u>July</u>	<u>Aug.</u>	<u>Sept.</u>	<u>Oct.</u>	<u>Nov.</u>	<u>Dec.</u>
							84 78	92 84	92 89	91 87	90 83
87	82	81	81	84	81	84	88	89	88	84	81
80	75	77	78	78	79	80	83	86	81	76	73
81	71	69	67	66	67	70	72	75	75	75	82
66	67	61	57	57	65	67	69	72	72	73	75
82	85	87	91	90	98	100	99	100	99	97	99
80	82	83	87	87	89	96	95	98	93	90	90
97	97	100	100	100	103	105	107	107	110	113	113
94	94	97	97	99	100	100	104	102	106	106	108
110	112	111	114	123	122	120	122	130	138	152	152
108	109	106	109	114	117	117	118	121	124	137	147
159											
149											
58	58	57	58	58	57	53	51	51	49	48	47
52	53	51	53	54	49	49	50	46	44	40	41
48	48	45	44	42	44	48	47	45	45	45	44
44	43	42	40	39	39	44	44	43	43	43	42
43	41	41	44	49	50	48	46	48	47	47	48
40	39	36	40	43	47	45	44	45	45	43	44
45	45	48	47	48	48	50	51	55	54	54	57
43	43	44	45	46	45	48	49	50	52	52	54
58	61	61	60	60	60	60	60	66	67	71	69
55	58	57	54	56	55	55	56	58	64	66	64
75	71	70	69	70	69	69	68	73	73	71	72
68	68	67	65	65	67	66	66	67	70	66	68
72	72	69	68	68	70	71	69	68	67	70	73
67	68	67	66	66	67	68	67	66	64	65	66
70	70	69	69	74	73	72	72	71	74	78	82
68	67	66	67	69	68	68	69	68	71	73	74

* used to next full figure for fractional price of one-half or more; fractional
under one-half disregarded.

period January 1 to January 16; on January 16, 1946 - stock split 3 for 1;
subsequent quotations reflect such split.

28.

The aforesaid loan was repaid as set out below by payments of interest and principal made by Chase Bank as Trustee from funds in its hands received as contributions of participants, as contributions by J. C. Penney Company under the provisions of the Plan, and received as dividends upon the shares of stock:

Date Paid	Paid as Interest	Paid as Principal	Balance Principal After Payment
1940			
Aug. 1	Principal of Note		\$5,700,000.00
Aug. 1		\$1,500,000.00	4,200,000.00
Sept. 26		150,000.00	4,050,000.00
Sept. 30		50,000.00	4,000,000.00
Oct. 17	\$12,975.00		
Dec. 27		550,000.00	3,450,000.00
1941			
Jan. 15	14,587.50		
Feb. 21		550,000.00	2,900,000.00
Mar. 5		1,850,000.00	1,050,000.00
Mar. 7		475,000.00	575,000.00
Mar. 31		75,000.00	500,000.00
Apr. 15	7,817.71		
June 30		150,000.00	350,000.00
Jul. 15	1,781.25		
Sept. 30		150,000.00	200,000.00
Oct. 15	1,218.75		
Dec. 27		200,000.00	—
Dec. 29	600.00		

29.

On July 25, 1940, R. W. Trown, then Comptroller of the Penney Company, mailed to each manager, including plaintiffs, and to eligible central and branch office executives, a letter in the form of Ex.

126, and enclosed therewith a printed booklet in the form of Ex. 125 and also enclosed a Participant's Acceptance Form.

30.

Plaintiff Harvey L. Wells and plaintiff Harry J. Albertsen, as store managers, each received one of the letters of R. W. Trown (Ex. 126), together with the printed booklet (Ex. 125) and the Participant's Acceptance Form. Each of the plaintiffs signed and returned to Penney Company the receipt appended to the foot of Ex. 126, and his executed Acceptance Form (Exs. 206, 207).

31.

On December 16, 1940, R. W. Trown certified the list of participants under the Plan (Ex. 124). As of December 16, 1940 there were 1,716 eligible participants, all of whom had executed their Participant's Acceptance Forms (Ex. 124). All eligible members of the management staff of Penney Company who thereafter became participants in the Plan also signed such "Participant's Acceptance Form."

32.

Plaintiff Harvey L. Wells' participation in the Plan continued from its inception until his resignation on August 31, 1948. Plaintiff Harry J. Albertsen's participation in the Plan continued from its inception until his discharge on December 31, 1950.

33.

Pursuant to the provisions of the Retirement Plan the following action was taken for the years 1940 through 1953 inclusive:

A. From their compensation earned in 1939 and paid in 1940, 1130 participants made voluntary contributions (being up to $33\frac{1}{3}$ per cent of the 1939 compensation of each) in the total amount of \$1,666,-827.89, of which amount \$1,575,000 was paid to the Trustee on August 1, 1940, and the remainder of \$91,827.89 was paid to the Trustee on September 26, 1940.

B. Each participant out of compensation earned in the years 1940 and 1941 contributed to the Fund under the Plan $33\frac{1}{3}\%$ of such annual compensation (Article 4 of Ex. 125) which were paid over to the Trustee in the amounts and on the dates set forth in the table set forth on page 26-b. Pursuant to the action taken by the Board of Directors in amending this Article because of increased Federal Personal Income Taxes, the percentage of each participant's contribution for subsequent years was reduced to 20% of his annual compensation. (pp. 1449-50 of Ex. 18; pp. 1497-98 of Ex. 20; pp. 1549-50 of Ex. 22).

C. After the close of the calendar year 1940 and of each calendar year thereafter, the Penney Company contributed annually to the Fund under the Plan:

1. An amount equal to 2% of the prior year's aggregate regular salary paid to all employees receiving compensation as defined in the Plan for all or any part of the respective year, pursuant to Article 6(a) of the Plan.

2. For each of the years 1940 through 1949, an amount equal to 6% of its consolidated net profits

for the calendar year in excess of 15% of its common stock book value as at the beginning of such calendar year, pursuant to Article 6(b) of the Plan. However, pursuant to the action of the Board of Directors taken because of the increased Federal taxes applicable to corporate profits for the years 1940 through 1945, in computing the contribution for these years called for by Article 6(b) there was charged against the consolidated net profits of the Company a lower amount for Federal taxes than the amount actually payable. (Ex. 9; pp. 1394-95 of Ex. 14; Ex. 16; pp. 1451-53 of Ex. 18; pp. 1501-03 of Ex. 20; pp. 1549-51 of Ex. 22). For the years 1946 through 1949, pursuant to an amendment adopted by the Board of Directors restoring subdivision (b) of Article 6 to its original form effective January 1, 1946 (pp. 1654-55 of Ex. 31) the Company's 6% contribution was computed and made as originally provided in Article 6(b).

3. For each of the years 1950 through 1953, pursuant to an amendment to the Plan approved by the stockholders at a special Stockholders' Meeting held on December 27, 1950 (Ex. 325), an amount equal to 2% of the profits of the Company and its wholly owned subsidiaries for such calendar year available to its common stock as shown by the books of the Company before deduction of provision for Federal taxes based on the profits of the Company and its subsidiaries, and the amounts required to be contributed by the Company for such year under the terms of its Thrift and Profit-Sharing Retirement Fund Plan and under the terms of this Plan.

34.

A. The annual contributions of each participant were credited to his separate account upon records maintained by the Administrative Committee of the Plan.

B. The Company's annual contributions measured by profits under Article 6(b) of the Plan were placed in an excess profits account for credit to accounts of participants upon their retirement or other separation from the Company.

C. The 200,000 shares of Penney Company common stock were separated in the Fund's accounts into two blocks, one of 50,000 shares and one of 150,000 shares.

D. The Company's contributions measured by salary under Article 6(a) of the Plan were credited to the \$1,500,000 cost of the 50,000 share block until that cost was entirely covered in September, 1941 by this contribution for 1940 amounting to \$102,-206.97 and dividend credits of \$1,397,793.03. Thereafter such contributions were credited to the Reserve for Retirement account for the purpose of covering the \$4,500,000 cost of the 150,000 share block.

E. After payment therefrom of interest on the money borrowed to purchase the stock and incidental Plan expenses not borne by the Company, dividends received by the Trustee on the 200,000 shares of stock (including the dividend credit of \$300,000 representing the equivalent of dividends of \$1.50 per share paid by the Company on its outstanding common stock in 1940 prior to the date

the Trustee purchased the stock, being the adjustment provided for in Article 5 of the Plan) were applied to cover the cost of the 50,000 share block of stock, which was covered in September, 1941. Dividends received by the Trustee thereafter were credited to the Dividend Account. On August 8, 1945 the Trustee paid the Company \$300,000, the amount of the adjustment referred to above, as an addition to the purchase price of the stock which payment was charged against the Dividend account. Participants' accounts were credited with their proportionate share of the net balance in the Dividend Account upon their retirement or other separation from the Plan.

35.

On July 1 of each year commencing with the year 1945 each participant who had attained or in that year attained the age of 60, as defined in the Plan, received a paid-up non-assignable annuity purchased with the credits shown on Exhibits 67 to 73, 313 and 315, together with the shares of stock shown upon such exhibits.

36.

A. The tabulation relating to retirements in 1945 (Ex. 67), was presented at the meeting of the Administrative Committee held July 20, 1945, and is the statement referred to as presented by R. W. Trown in the minutes of said meeting (Ex. 90).

B. The tabulation relating to retirements in 1946 (Ex. 68), was presented at the meeting of the Administrative Committee held July 23, 1946, and is the statement referred to as presented by R. C.

Weiderman in the minutes of said meeting (Ex. 96).

C. The tabulation relating to retirements in 1947 (Ex. 69), was presented at the meeting of the Administrative Committee held July 30, 1947, and is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 99).

D. The tabulation relating to retirements in 1948 (Ex. 70), was presented at the meeting of the Administrative Committee held July 30, 1948, and is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 104).

E. The tabulation relating to retirements in 1949 (Ex. 71), was presented at the meeting of the Administrative Committee held July 15, 1949, and is the statement referred to as presented by Mr. Campbell in the minutes of said meeting (Ex. 111).

F. The tabulation relating to retirements in 1950 (Ex. 72), was presented at the meeting of the Administrative Committee held July 28, 1950, and is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 115).

G. The tabulation relating to retirements in 1951 (Ex. 73), was presented at the meeting of the Administrative Committee held July 13, 1951, and is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 122).

H. The tabulation relating to retirements in 1952 (Ex. 313), was presented at the meeting of the Administrative Committee held July 11, 1952, and

is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 314).

I. The tabulation relating to retirements in 1953 (Ex. 315), was presented at the meeting of the Administrative Committee held July 14, 1953, and is the statement referred to as presented by R. C. Weiderman in the minutes of said meeting (Ex. 316).

37.

Each participant whose participation ceased prior to July 1, 1945, or thereafter but prior to such participant's reaching age 60, as defined in the Plan, or in case of death, his beneficiary, received the total amount shown upon Exhibit 292.

38.

The total contributions of all participants for each year with the date the same were paid into the Fund, the withdrawals of contributions by participants prior to July 1 of each year, the total contributions of all participants in the Fund on July 1 of each year, the withdrawals of contributions by participants retired on July 1 of each year, the withdrawals of contributions by participants from July 1 to December 31 of each year, and the total contributions of all participants in the Fund on December 31 of each year, were as shown below:

Date Paid	Compensation for Year	Service Contributions	Regular Contributions	January 1 to June 30	in Fund July 1	Retirements July 1	July 1 to December 31	in Fund December 31
1939	1939	\$ -	\$1,666,827.89	\$ -	\$ 1,666,827.89*	\$ -	\$ 3,436.73	\$ 1,663,391.16
1940	1940	-	2,374,941.39	58,996.15	3,979,336.40	-	25,446.39	3,953,890.01
1941	1941	3,832.08	4,207,163.20	163,541.53	8,001,343.76	-	20,831.76	7,980,512.00
1942	1942	21,835.67	2,990,684.65	132,404.36	10,860,627.96	-	145,089.93	10,715,538.03
1943	1943	105,015.69	2,500,731.91	190,424.78	13,130,860.85	-	151,957.66	12,978,903.19
1944	1944	136,527.41	2,769,758.15	321,760.12	15,563,428.63	743,059.16	382,889.43	14,437,480.04
1945	1945	91,763.35	2,385,736.06	527,081.59	16,387,897.86	180,351.19	194,083.95	16,013,462.72
1946	1946	9,352.10	2,972,507.23	497,014.11	18,498,307.94	359,033.40	278,301.84	17,860,972.70
1947	1947	-	2,896,387.51	717,377.84	20,039,982.37	344,041.50	150,669.78	19,545,271.09
1948	1948	-	4,062,407.13	520,453.35	23,087,224.87	480,422.45	130,954.43	22,475,847.99
1949	1949	-	3,625,287.15	542,078.60	25,559,056.54	714,276.53	88,035.35	24,756,744.66
1950	1950	305.70	4,462,457.28	388,632.61	28,830,875.03	972,501.75	216,325.37	27,642,047.91
1951	1951	883.13	4,034,269.45	701,081.89	30,976,118.60	1,430,153.91	384,967.70	29,160,996.99
1952	1952	1,547.35	4,423,539.71	556,249.37	33,029,834.68	1,128,302.62	366,082.02	31,535,450.04

*Trust Agreement entered into July 8, 1940; this amount paid to Fund August 1, 1940 and September 26, 1940.

8-1-40
9-26-40

\$ 1,575,000.00
91,827.89
1,666,827.89

2-20-41
3-5-41
4-2-41
5-15-41

533,143.05
1,824,676.02
988.84
16,133.48
2,374,941.39

1-9-42
3-3-42
3-18-42
4-17-42
5-20-42

3,832.08
901,266.34
801,012.45
267,971.87
4,874.37
4,207,163.20

2-19-43
2-26-43
3-1-43
4-12-43
5-5-43
8-9-43

21,835.67
1,394,021.59
605,728.41
647,482.39
340,142.62
2,321.31
988.33
2,990,684.65

2-29-44
4-27-44

105,015.69
1,682,610.96
818,120.95
2,500,731.91

1-23-45
2-28-45
5-23-45

136,527.41
100,000.00
2,484,946.07
184,812.08
2,769,758.15

1-29-46
2-28-46
6-3-46

\$ 91,763.35
91,763.35

2-24-47
2-26-47
3-18-47
5-21-47

9,352.10
9,352.10

2-27-48
2-28-48
3-16-48
6-28-48

695,502.86
175,862.71
2,000,000.00
25,021.94
2,896,387.51

1-26-49
2-25-49
5-17-49

3,000,000.00
907,714.68
154,692.45
4,062,407.13

1-19-50
2-28-50
4-12-50

2,000,000.00
1,475,156.80
150,130.35
3,625,287.15

1-25-51
2-28-51
4-5-51

3,000,000.00
1,310,199.14
152,258.14
4,462,457.28

Additional contributions arising from adjustments of several participants' compensation for previous year.

Date Paid	Military Service Contributions		Regular Contributions	
	Military Service Contributions	Regular Contributions	Date Paid	Regular Contributions
1-18-52	\$ -	\$2,500,000.00		
2-25-52	-	1,434,986.64		
4-16-52	883.13	99,282.81		
	<u>883.13</u>	<u>4,034,269.45</u>		
1-19-53	-	2,500,000.00		
2-25-53	-	1,777,158.29		
3-25-53	1,547.35	146,381.42		
	<u>1,547.35</u>	<u>4,423,539.71</u>		

39.

The dividends received upon the shares of stock held in the Fund, after allocation for the cost of the 50,000 share block and expenses, together with the dates when such dividends were received, the withdrawals from the Dividend Account by retirements of participants and otherwise for the years 1940 to 1952, both inclusive, and to Oct. 1, 1953, were as shown below:

1
2
3
4
5
6
7
8
9
10

1940

Sept. 30	\$.75	\$.25	\$ 150,000.00
Dec. 26	2.75	.91 2/3	<u>550,000.00</u>
Total for year			\$ 700,000.00

\$25,406.25

1941

Mar. 31	\$.75	\$.25	\$ 150,000.00
June 30	.75	.25	150,000.00
Sept. 30	.75	.25	150,000.00
Dec. 27	2.75	.91 2/3	<u>550,000.00</u>
Total for year			\$1,000,000.00

14,833.35

\$ 32.27

\$ 561,935.10

1942

Mar. 31	\$.75	\$.25	\$ 150,000.00
June 30	.75	.25	150,000.00
Sept. 30	.75	.25	150,000.00
Dec. 24	2.75	.91 2/3	<u>550,000.00</u>
Total for year			\$1,000,000.00

15,246.72

1,546,688.38

1943

Mar. 31	\$.75	\$.25	\$ 150,000.00
June 30	.75	.25	150,000.00
Sept. 30	.75	.25	150,000.00
Dec. 24	2.75	.91 2/3	<u>550,000.00</u>
Total for year			\$1,000,000.00

44,606.44

2,502,081.94

1994		Present Share	Stock	Amount	Shares	Expenses	Retirement	Otherwise	in Full December 31
Mar. 31	\$.75	\$.25	\$ 150,000.00						
June 30	.75	.25	150,000.00						
Sept. 30	.75	.25	150,000.00						
Dec. 23	2.75	.91 2/3	550,000.00						
Total for year				\$2,000,000.00				\$ 70,253.44	\$3,431,823.50
1995									
Mar. 31	\$.75	\$.25	\$ 150,000.00						
June 30	.75	.25	150,000.00						
Sept. 29	.75	.25	144,627.75						
Dec. 22	2.75	.91 2/3	530,301.75						
Total for year				\$ 974,929.50	300,000.00*		\$160,480.63	154,892.61	3,791,384.76
1996									
Mar. 30	\$.35	\$.35	\$ 202,478.85						
June 29	.35	.35	202,478.85						
Sept. 30	.50	.50	286,778.50						
Dec. 28	1.50	1.50	860,335.50						
Total for year				\$1,552,071.70			44,827.51	173,134.49	5,125,494.46
1997									
Mar. 31	\$.50	\$.50	\$ 286,778.50						
June 30	.50	.50	286,778.50						
Sept. 30	.50	.50	282,411.50						
Total for year				\$ 855,968.50			107,906.44	224,487.65	5,649,058.97

*Represents payment by Trustee to Company as additional purchase price of 200,000 shares of stock and applied to cost of 50,000 shares.

		Cost 50,000 Shares		Expenses	Retirement	Otherwise	In Fund December 31
Present Stock		Amount					
<u>1948</u>							
Jan. 2	(Ex 136a)	\$ 564,823.00					
Apr. 1	(Ex 136b)	282,411.50					
July 1	(Ex 136c)	282,411.50					
Oct. 1	(Ex 136d)	278,546.00					
Total for year		\$1,408,194.00			\$112,581.68	\$271,158.80	\$6,673,522.39
<u>1949</u>							
Jan. 3	(Ex 137a)	\$ 557,096.00					
Apr. 1	(Ex 137b)	278,548.00					
July 1	(Ex 137c)	278,509.00					
Oct. 1	(Ex 137d)	273,828.50					
Total for year		\$1,387,981.50			159,265.22	205,619.24	7,696,619.43
<u>1950</u>							
Jan. 3	(Ex 138a)	\$ 821,485.50					
Apr. 1	(Ex 138b)	273,828.50					
July 1	(Ex 138c)	273,828.50					
Oct. 2	(Ex 138d)	267,539.00					
Total for year		\$1,636,681.50			248,287.73	212,336.32	8,872,676.88
<u>1951</u>							
Jan. 3	(Ex 139a)	\$1,070,156.00					
April 2	(Ex 139b)	267,539.00					
July 2	(Ex 139c)	267,539.00					
Oct. 1		259,950.50					
Total for year		\$1,865,184.50			348,895.13	212,926.07	10,176,040.18

1952

Jan. 2	\$ 909,826.75		
Apr. 1	259,950.50		
July 1	259,950.50		
Oct. 1	<u>249,562.00</u>		
Total for year	\$1,679,289.75	\$524,320.55	\$391,437.28
			\$10,939,572.10

1953

Jan. 2	\$ 998,248.00		
Apr. 1	249,562.00		
July 1	249,562.00		
Oct. 1	<u>241,877.00</u>		
Total for year	\$1,739,249.00	417,949.75	340,096.80
			11,920,774.55

1
2
3
4
5
6
7
8
9

40.

The contributions of Penney Company from excess profits under Article 6(b) of the Plan, with the dates of payment to the Fund, the withdrawals from the Excess Profits Account by participants from January 1 to June 30 of each year, by retirements on July 1 of each year, and by withdrawals between July 1 and December 31 of each year, and the balance in the Excess Profits Account on July 1 and December 31 of each year for the years 1941 to 1953, both inclusive, were as follows:

Statement of

1952-1953 Pre-trial Order

Date Paid*	For Year	Total Withdrawals	Contributions	from January 1 to June 30	Balance on July 1	Retirement July 1	from July 1 to December 31	Balance December 31
<u>1941</u>	1940	\$ 7,338.64	\$ 371,931.56	\$ 5,339.92	\$ 366,591.64	\$ -	\$ 1,998.72	\$ 364,592.92
<u>1942</u>	1941	28,254.38	955,639.69	25,174.61	1,295,058.00	-	3,079.77	1,291,978.23
<u>1943</u>	1942	59,474.61	1,290,275.31	28,374.22	2,553,879.32	-	31,100.39	2,522,778.93
<u>1944</u>	1943	84,705.54	986,996.36	47,230.71	3,462,544.58	-	37,474.83	3,425,069.75
<u>1945</u>	1944	387,532.06	1,049,891.44	86,315.77	4,388,645.42	197,395.18	103,821.11	4,087,429.13
<u>1946</u>	1945	265,675.28	1,056,981.14	156,192.50	4,988,217.77	51,602.97	57,879.81	4,878,734.99
<u>1947</u>	1946	354,119.14	1,287,254.49	159,331.71	6,006,657.77	107,692.48	87,094.95	5,811,870.34
<u>1948</u>	1947	393,935.84	1,156,563.53	235,165.95	6,733,267.92	109,248.17	49,521.72	6,574,498.03
<u>1949</u>	1948	392,541.16	1,809,556.33	184,441.21	8,199,613.15	161,413.36	46,686.59	7,991,513.20
<u>1950</u>	1949	453,539.75	1,131,431.69	188,011.01	8,934,933.88	234,171.64	31,357.10	8,669,405.14
<u>1951</u>	1950	522,142.62	1,194,348.86	133,747.44	9,730,006.56	314,594.96	73,800.22	9,341,611.38
<u>1952</u>	1951	862,373.07	1,756,878.19	244,479.91	10,854,009.66	485,087.23	132,805.93	10,236,116.50
<u>1953</u>	1952	720,078.06	1,957,011.45	197,366.71	11,995,761.24	392,373.58	130,337.77	11,473,049.89

*The contribution for the year 1940 was paid on March 6, 1941; payments for other years were made on or before the 60th day of the year shown in this column to conform with the provision of the Revenue Act of 1942.

The cash in the hands of the Trustee on the dates shown

the following was the amount shown opposite the date in the first

upon and after receipt of funds shown:

[illegible]

actually made up of May 7 withdrawals totalling \$10,592.67, less redeposit on that date of check drawn March 12 to L. E. Ramon for \$488.97, plus May 8 total withdrawals of \$7,706.24.



The figures reflecting the operation of the Plan for the period January 1, 1940, through December 31, 1953, as recorded on the books of account of the Fund maintained by the Administrative Committee of the Plan are set forth on Schedule 1 (pages 1-6)

SCHEDULE 1

Figures reflecting the operation of the Retirement Plan for the period January 1, 1940 through December 31, 1953

Company's Contributions															
J. C. Penney Company Common Stock Block No.1 (Shares)		Dividends on J. C. Penney Company Common Stock Applied to Interest Cost of Stock Block No. 1 (Shares)		Credited to Dividend A/C		Under Article 6A				Participants' Contributions	Fund Earnings (Net)	Rate Credits (Dividends) From Insur- ance Cos.	Total	Year	
						Applied to Cost of Stock		Credited to Reserve for Retirement							Under Article 6B
						Amount	Block No.1	Amount	Block No.1						Amount
Table A - RECEIPTS OF FUND UNDER PLAN															
50,000	150,000	1,000,000.00(1)	25,406.25	974,593.75	-	102,206.97	102,206.97	-	371,931.56	4,041,769.28(2)	-	-	5,515,907.81	1940	
-	-	1,000,000.00	14,833.33	423,199.28	561,967.37	-	108,490.06	-	108,490.06	955,639.69	4,210,995.28	-	-	6,275,125.03	1941
-	-	1,000,000.00	-	-	1,000,000.00	115,703.10	-	-	115,703.10	1,290,275.31	3,012,520.32	-	-	5,498,759.72	1942
-	-	1,000,000.00	-	-	1,000,000.00	125,376.99	-	-	125,376.99	986,596.36	2,605,747.60	-	-	4,820,950.47	1943
-	-	1,000,000.00	-	-	1,000,000.00	128,635.08	-	-	128,635.08	1,049,691.44	2,906,285.56	-	-	5,235,376.10	1944
-	-	674,929.50(3)	-	-	674,929.50(3)	134,618.60	-	-	134,618.60	1,056,981.14	2,477,499.61	-	-	4,520,763.39	1945
85,674(4)	300,000(4)	1,552,071.70	-	-	1,552,071.70	147,776.61	-	-	147,776.61	1,287,294.49	2,981,859.33	-	-	6,170,414.18	1946
-	-	1,400,791.50	-	-	1,400,791.50	167,573.76	-	-	167,573.76	1,156,563.53	2,896,387.51	-	-	5,880,741.70	1947
-	-	1,400,467.00	-	-	1,400,467.00	182,728.99	-	-	182,728.99	1,809,556.33	4,062,407.13	-	-	7,496,068.61	1948
-	-	1,652,371.00	-	-	1,652,371.00	193,411.51	-	-	193,411.51	1,131,431.69	3,625,287.15	-	-	6,080,564.56	1949
-	-	1,885,352.00	-	-	1,885,352.00	195,432.00	-	-	195,432.00	1,194,348.86	4,462,762.98	-	-	6,302,567.41	1950
-	-	1,704,855.25	-	-	1,704,855.25	206,135.17	-	-	206,135.17	1,756,878.19	4,035,132.58	-	-	6,875,005.39	1951
-	-	1,767,711.00	-	-	1,767,711.00	215,830.26	-	-	215,830.26	1,957,011.45	4,425,087.06	-	-	9,205,503.31	1952
-	-	1,708,509.00	-	-	1,708,509.00	226,262.10	-	-	226,262.10	1,928,209.80	4,426,352.33	-	-	9,041,171.83	1953
35,674	450,000	18,767,057.95	40,239.60	1,397,793.03	17,329,025.32	2,252,203.20	102,206.97	2,149,996.23	17,986,969.84	50,170,113.52(5)	1,015,799.08	3,285,903.92	-	93,478,047.51	

Table B - WITHDRAWALS FROM FUND BY PARTICIPANTS ON SEPARATION, INCLUDING RETIREMENTS

-	-	-	-	-	-	-	-	-	-	3,436.73	-	-	-	-	3,436.73		
-	-	32.27	-	-	32.27	-	-	-	-	7,338.64	84,442.54	-	-	-	91,813.45		
-	-	15,246.72	-	-	15,246.72	-	-	-	-	28,254.38	184,373.29	-	-	-	227,874.39		
-	-	44,606.44	-	-	44,606.44	-	-	-	-	59,474.61	277,494.29	-	-	-	381,575.34		
-	-	70,253.44	-	-	70,253.44	-	-	-	-	84,705.54	342,382.44	-	-	-	497,341.42		
7,163(7)	-	315,373.24	-	-	315,373.24	-	-	-	-	387,532.06	1,447,708.71	-	-	-	2,150,614.01		
4,954	-	217,952.00	-	-	217,952.00	-	-	-	-	265,675.28	901,516.73	-	-	-	1,385,154.01		
8,734	-	332,394.09	-	-	332,394.09	-	-	-	-	354,119.14	1,134,349.35	-	-	-	1,826,862.58		
7,727	-	383,740.48	-	-	383,740.48	-	-	-	-	393,935.84	1,212,089.12	-	-	-	2,136,267.43		
9,439	-	364,884.46	-	-	364,884.46	-	-	-	-	392,544.16	1,131,830.23	-	-	-	1,943,704.93		
12,579	-	460,684.05	-	-	460,684.05	-	-	-	-	533,539.75	1,344,320.48	-	-	-	2,344,293.82		
15,377	-	561,821.20	-	-	561,821.20	-	-	-	-	522,142.62	1,577,479.73	-	-	-	2,805,655.65		
20,777	-	915,757.83	-	-	915,757.83	-	-	-	-	862,373.07	2,516,203.50	-	-	-	4,579,646.84		
15,370	-	758,046.55	-	-	758,046.55	-	-	-	-	720,078.06	2,050,634.01	-	-	-	3,782,368.72		
01,920	-	4,440,742.77	-	-	4,440,742.77	-	-	-	-	4,531,710.15	14,208,311.15	-	-	-	397,490.85	572,958.40	24,151,213.32
33,754	450,000	14,326,315.18	40,239.60	1,397,793.03	12,888,282.55	2,252,203.20	102,206.97	2,149,996.23	13,455,259.69	35,961,802.37	618,308.23	2,712,945.52	-	69,326,834.19			
0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
-	-	1,397,793.03	-	1,397,793.03	-	102,206.97	102,206.97	-	-	-	-	-	-	-	1,500,000.00	-	-
-	-	40,239.60	40,239.60	-	-	-	-	-	-	-	-	-	-	-	40,239.60	-	-
-	-	1,438,032.63	40,239.60	1,397,793.03	-	102,206.97	102,206.97	-	-	-	-	-	-	-	1,540,239.60	-	-

was received in 1940 on the 200,000 shares of stock amounted to \$700,000. To this amount has been added \$300,000, representing the equivalent of dividends of \$1.50 per share paid by J. C. Penney any on its common stock in 1940 prior to the acquisition of the 200,000 shares of stock by the Trustee and, in accordance with the provisions of the Plan, regarded as dividends.

of \$1,666,827.89 of permitted contributions from 1939 compensation of participants.

charge to dividend account of \$300,000 payment by Trustee to J. C. Penney Company as additional purchase price of the 200,000 shares of stock, in settlement of a stockholder's action judicially

provided in January 1946 as a result of the Company's three-for-one split of its stock.

as \$371,521.76 contributed by Company equivalent to amount which would have been contributed by participants had they continued in active employ of the Company for the periods during which they

and in the Armed Forces.

figures are stated on the basis of the Company's stock before its three-for-one split; figures for subsequent years are stated on basis of Company's stock after split.

are the share of the Reserve for Depreciation of Assets distributed in cash to former Plan participants.

SCHEDULE 1

(Page 1)

SCHEDULE 1

Table B on preceding page segregated as to withdrawals by participants whose participation ceased before reaching retirement status and those who reached retirement status

Shares of J.C. Penney Company Common Stock	J.C. Penney Company Dividends credited to Dividend A/C	Company's contributions under Article 6B	Participants' Contributions	Fund Earnings	Rate Credits (Dividends) from Insurance Co.	Total	Year
-	-	-	3,436.73	-	-	3,436.73	1940
-	32.27	7,338.64	84,442.54	-	-	91,813.45	1941
-	15,246.72	28,254.38	184,373.29	-	-	227,874.39	1942
-	44,606.44	59,474.61	277,494.29	-	-	381,575.34	1943
-	70,253.44	84,705.54	342,382.44	-	-	497,341.42	1944
-	154,892.61	190,136.88	704,649.55	-	-	1,049,679.04	1945
-	173,134.49	214,072.31	721,165.54	-	-	1,108,372.34	1946
-	224,487.65	246,426.66	775,315.95	-	-	1,246,230.26	1947
-	271,158.80	284,687.67	868,047.62	100,469.50	-	1,524,363.59	1948
-	205,619.24	230,528.88	645,802.36	23,762.47	6,246.71	1,111,955.66	1949
-	212,336.32	219,368.11	630,113.95	19,252.32	19,140.47	1,100,211.17	1950
-	212,926.07	207,547.66	604,957.98	14,863.86	39,458.33	1,079,753.90	1951
-	391,437.28	377,285.84	1,086,049.59	27,822.04	135,256.03	2,017,850.78	1952
-	340,096.80	327,704.48	922,331.39	20,719.73	118,426.09	1,729,278.49	1953
-	2,316,228.13	2,477,527.66	7,850,563.22	206,889.92	318,527.63	13,169,736.56	

Table D - Withdrawals by participants who reached retirement status

-	-	-	-	-	-	-	1940
-	-	-	-	-	-	-	1941
-	-	-	-	-	-	-	1942
-	-	-	-	-	-	-	1943
-	-	-	-	-	-	-	1944
7,163	160,480.63	197,395.18	743,059.16	-	-	1,100,934.97	1945
4,954	44,827.51	51,602.97	180,351.19	-	-	276,781.67	1946
8,734	107,906.44	107,692.48	359,033.40	-	-	574,632.32	1947
7,727	112,581.68	109,248.17	344,041.50	46,032.49	-	611,903.84	1948
9,439	159,265.22	162,016.28	486,027.87	18,821.10	5,618.80	831,749.27	1949
12,579	248,287.73	234,171.64	714,276.53	25,225.46	22,721.29	1,244,682.65	1950
15,177	348,895.13	314,594.96	972,501.75	30,432.04	59,481.87	1,725,905.75	1951
20,777	524,320.55	485,087.23	1,430,153.91	40,780.47	81,453.90	2,561,796.06	1952
15,370	417,949.75	392,373.58	1,128,302.62	29,309.37	85,154.91	2,053,090.23	1953
101,920	2,128,514.64	2,054,182.49	6,357,747.93	190,600.93	254,430.77	10,981,476.76	
101,920	4,440,742.77	4,531,710.15	14,208,311.15	397,490.85	572,958.40	24,151,213.32	

Amount shown in this column for 1948, 1949, 1950 and 1951 differs from that shown on the statements attached to the minutes of the Administrative Committee (Exs. 70, 71, 72 and 73) as having been used for the purchase of annuities for the participants who retired each of these years because it includes:

8 - \$46,032.49 - the share of the Reserve for Depreciation of Assets distributed in cash to participants who had reached retirement status prior to the distribution;

9 - \$5,618.80 - dividends paid by insurance companies as of but subsequent to June 30, 1949 allocable to participants who retired on July 1 that year and applied by the insurance companies to increase the annuities received by them on their retirement;

0 - \$15,270.16 and 1951 - \$31,798.51 - dividends paid by insurance companies in 1950 and 1951 as of but subsequent to June 30 of the respective years allocable to participants who retired on July 1 in those years and paid to them by the insurance companies in cash, pursuant to a 1950 amendment to the Group Annuity Contracts.



SCHEDULE 1

Participants' contributions (including military service contributions)
and participants' withdrawals segregated to periods shown

Table E

Contributions in Fund January 1	Withdrawals From January 1 to June 30	Contributions in Fund July 1	Withdrawals By Retirement July 1	Withdrawals From July 1 to Dec. 31	Contributions from Compensation				Contributions in Fund December 31
					Year Earned	Year Paid	Total Contributions Regular	Military Service (1)	
-	-	-	-	-	1939	1940	1,666,827.89*	-	-
-	-	1,666,827.89	-	3,436.73	1940	1941	2,374,941.39 }	-	4,038,332.55
4,038,332.55	58,996.15	3,979,336.40	-	25,446.39	1941	1942	4,207,163.20	3,832.08	8,164,885.29
8,164,885.29	163,541.53	8,001,343.76	-	20,831.76	1942	1943	2,990,684.65	21,835.67	10,993,032.32
10,993,032.32	132,404.36	10,860,627.96	-	145,089.93	1943	1944	2,500,731.91	105,015.69	13,321,285.63
13,321,285.63	190,424.78	13,130,860.85	-	151,957.66	1944	1945	2,769,758.15	136,527.41	15,885,188.75
15,885,188.75	321,760.12	15,563,428.63	743,059.16	382,889.43	1945	1946	2,385,736.06	91,763.35	16,914,979.45
16,914,979.45	527,081.59	16,387,897.86	180,351.19	194,083.95	1946	1947	2,972,507.23	9,352.10	18,995,322.05
18,995,322.05	497,014.11	18,498,307.94	359,033.40	278,301.84	1947	1948	2,896,387.51	-	20,757,360.21
20,757,360.21	717,377.84	20,039,982.37	344,041.50	150,669.78	1948	1949	4,062,407.13	-	23,607,678.22
23,607,678.22	520,453.35**	23,087,224.87	480,422.45	130,954.43	1949	1950	3,625,287.15	-	26,101,135.14
26,101,135.14	542,078.60	25,559,056.54	714,276.53	88,035.35	1950	1951	4,462,457.28	305.70	29,219,507.64
29,219,507.64	388,632.61	28,830,875.03	972,501.75	216,325.37	1951	1952	4,034,269.45	883.13	31,677,200.49
31,677,200.49	701,081.89	30,976,118.60	1,430,153.91	384,967.70	1952	1953	4,423,539.71	1,547.35	33,586,084.05
33,586,084.05	556,249.37	33,029,834.68	1,128,302.62	366,082.02	1953	1954	4,425,893.05	459.28	35,961,802.37

Figure represents total voluntary contributions of participants from 1939 compensation.
\$5,605.42 for W. E. Keith, actually born in 1885 but on his Participant's Acceptance Form showed 1894 as year of birth; terminated
in March, 1949 and treated as though he had reached retirement status on July 1, 1945. Of the \$5,605.42, \$2,732.25 applied to
Keith's annuity and the balance, being his personal deposits for years 1945 through 1948, was refunded to Keith.
Participants in military service: equivalent to amounts they would have contributed had they remained in the active employ of the
for the periods of their military service.

SCHEDULE 1

Company contributions under Article 6 (b) and
participants' withdrawals segregated to periods shown

Table F

<u>Balance in Account January</u>	<u>Withdrawals from January 1 to June 30</u>	<u>Balance in Account July 1</u>	<u>Withdrawals by Retire- ments July 1</u>	<u>Withdrawals from July 1 to Dec. 31</u>	<u>Company Contributions</u>	<u>Balance in Account December 31</u>
-	-	-	-	-	371,931.56	371,931.56
371,931.56	5,339.92	366,591.64	-	1,998.72	955,639.69	1,320,232.61
1,320,232.61	25,174.61	1,295,058.00	-	3,079.77	1,290,275.31	2,582,253.54
2,582,253.54	28,374.22	2,553,879.32	-	31,100.39	986,996.36	3,509,775.29
3,509,775.29	47,230.71	3,462,544.58	-	37,474.83	1,049,891.44	4,474,961.19
4,474,961.19	86,315.77	4,388,645.42	197,395.18	103,821.11	1,056,981.14	5,144,410.27
5,144,410.27	156,192.50	4,988,217.77	51,602.97	57,879.81	1,287,254.49	6,165,989.48
6,165,989.48	159,331.71	6,006,657.77	107,692.48	87,094.95	1,156,563.53	6,968,433.87
6,968,433.87	235,165.95	6,733,267.92	109,248.17	49,521.72	1,809,556.33	8,384,054.36
8,384,054.36	184,441.21*	8,199,613.15	161,413.36	46,696.59	1,131,431.69	9,122,944.89
9,122,944.89	188,011.01	8,934,933.88	234,171.64	31,357.10	1,194,348.86	9,863,754.00
9,863,754.00	133,747.44	9,730,006.56	314,594.96	73,800.22	1,756,878.19	11,098,489.57
11,098,489.57	244,479.91	10,854,009.66	485,087.23	132,805.93	1,957,011.45	12,193,127.95
12,193,127.95	197,366.71	11,995,761.24	392,373.58	130,337.77	1,982,209.80	13,455,259.69

udes \$1,831.05 from the account of W. E. Keith (see footnote on Page 3 of this Schedule); \$602.92 applied to purchase Keith's annuity
the balance, being credits to Keith's account for years 1945 through 1948, was held in suspense and credited to other participants'
unts as Company contribution as at end of 1949.



SCHEDULE 1

Dividends on J. C. Penney Company stock held by Trustee
showing receipts, applications and withdrawals

Table G

Of Record	Per Share	Present Stock	Amount	Dividend Applied		Dividend Account	Withdrawals from Dividend Account		Balance in Account	
				Cost 50,000 Shares	Expenses		Retirements	Otherwise	December 31	Year
				(Dividends received in 1940 on the 200,000 shares of stock amounted to \$700,000. To this amount has been added \$300,000, representing the equivalent of dividends of \$1.50 per share paid by J. C. Penney Company on its common stock in 1940 prior to the acquisition of the 200,000 shares of stock by the Trustee and, in accordance with the provisions of the Plan, regarded as dividends.)						
0	\$.75	\$.25	\$ 150,000.00							
0	.75	.25	150,000.00							
0	.75	.25	150,000.00							
0	2.75	.91 2/3	550,000.00							
			<u>1,000,000.00</u>	974,593.75	25,406.25	None			None	1940
1	.75	.25	150,000.00							
1	.75	.25	150,000.00							
1	.75	.25	150,000.00							
1	2.75	.91 2/3	550,000.00							
			<u>1,000,000.00</u>	423,199.28	14,833.35	561,967.37	-	32.27	561,935.10	1941
2	.75	.25	150,000.00							
2	.75	.25	150,000.00							
2	.75	.25	150,000.00							
2	2.75	.91 2/3	550,000.00							
			<u>1,000,000.00</u>			1,000,000.00	-	15,246.72	1,546,688.38	1942
3	.75	.25	150,000.00							
3	.75	.25	150,000.00							
3	.75	.25	150,000.00							
3	2.75	.91 2/3	550,000.00							
			<u>1,000,000.00</u>			1,000,000.00	-	44,606.44	2,502,081.94	1943
4	.75	.25	150,000.00							
4	.75	.25	150,000.00							
4	.75	.25	150,000.00							
4	2.75	.91 2/3	550,000.00							
			<u>1,000,000.00</u>			1,000,000.00	-	70,253.44	3,431,828.50	1944
5	.75	.25	150,000.00							
5	.75	.25	150,000.00							
Payment in August 1945 by Trustee to Company as additional purchase price of \$200,000 shares of stock.			<u>300,000.00</u>							
5	.75	.25	144,627.75							
5	2.75	.91 2/3	530,301.75							
			<u>674,929.50</u>			674,929.50	160,480.63	154,892.61	3,791,384.76	1945
6 (Stock Split)	.35	.35	202,478.85							
6 (3 for 1 on)	.35	.35	202,478.85							
6 (1-16-1946)	.50	.50	286,778.50							
6	1.50	1.50	860,335.50							
			<u>1,552,071.70</u>			1,552,071.70	44,827.51	173,134.49	5,125,494.46	1946
7	.50	.50	286,778.50							
7	.50	.50	286,778.50							
7	.50	.50	282,411.50							
12/17/47	1.00	1.00	564,823.00*							
			<u>1,420,791.50</u>			1,420,791.50	107,906.44	224,487.65	6,213,891.87	1947

ing December 1, 1947, pursuant to an amendment to Article 7(e) of the Plan, cash dividends on any of the 200,000 shares of stock held by the Fund were considered for all purposes of the Plan to be in the Dividend Account as of the record or the determination of stockholders entitled to receive such dividends.

SCHEDULE 1
(Page 5)

Date	Of Record	Share	Per Share Present Stock	Amount	Dividend Applied		Withdrawals from Dividend Account		Balance in Account		
					Cost 50,000 Shares	Expenses	Dividend Account	Retirements	Otherwise	December 31	Year
4/8	3/8/48	\$.50	\$.50	\$ 282,411.50							
4/8	6/10/48	.50	.50	282,411.50							
4/8	9/9/48	.50	.50	278,548.00							
4/9	12/16/48	1.00	1.00	557,096.00							
				<u>1,400,467.00</u>			1,400,467.00	112,581.68	271,158.80	7,230,618.39	1948
4/9	3/7/49	.50	.50	278,548.00							
4/9	6/10/49	.50	.50	278,509.00							
4/9	9/8/49	.50	.50	273,828.50							
5/0	12/14/49	1.50	1.50	821,485.50							
				<u>1,652,371.00</u>			1,652,371.00	159,265.22*	205,619.24	8,518,104.93	1949
5/0	3/7/50	.50	.50	273,828.50							
5/0	6/9/50	.50	.50	273,828.50							
5/0	9/8/50	.50	.50	267,539.00							
5/1	12/14/50	2.00	2.00	1,070,156.00							
				<u>1,885,352.00</u>			1,885,352.00	248,287.73	212,336.32	9,942,832.88	1950
5/1	3/7/51	.50	.50	267,539.00							
5/1	6/7/51	.50	.50	267,539.00							
5/1	9/7/51	.50	.50	259,950.50							
5/2	12/14/51	1.75	1.75	909,826.75							
				<u>1,704,855.25</u>			1,704,855.25	348,895.13	212,926.07	11,085,866.93	1951
5/2	3/7/52	.50	.50	259,950.50							
5/2	6/6/52	.50	.50	259,950.50							
5/2	9/5/52	.50	.50	249,562.00							
5/3	12/15/52	2.00	2.00	990,248.00							
				<u>1,767,711.00</u>			1,767,711.00	524,320.55	391,437.28	11,937,820.10	1952
5/3	3/6/53	.50	.50	249,562.00							
5/3	6/5/53	.50	.50	249,562.00							
5/3	9/4/53	.50	.50	241,877.00							
5/4	12/15/53	2.00	2.00	967,508.00							
				<u>1,708,509.00</u>			1,708,509.00	417,948.75	340,096.80	12,888,282.55	1953

includes \$590.09 for W. E. Keith. See foot note on Page 3 of this Schedule.

SCHEDULE 1
(Page 6)

42.

A. The charts appearing in paragraphs 38, 39, 40 and 40-a have been submitted on behalf of the plaintiffs; Schedule 1 which includes Tables A-G appearing in paragraph 41 above has been submitted on behalf of the defendants.

B. The difference in the year-end figures of participants' contributions as shown in plaintiffs' chart in paragraph 38, on the one hand, and in Schedule 1, Table E in paragraph 41, on the other hand, arises from the following circumstances:

(i) In plaintiffs' chart the year-end balance of participants' contributions is shown on a cash receipts basis.

(ii) The year-end figures of participants' contributions appearing in Table E of Schedule 1 in paragraph 41 above are taken from the books of account of the Fund maintained by the Administrative Committee of the Plan and are upon an accrual basis, that is to say, participants' contributions have been treated as though they were in the Fund at the end of the year in which their compensation was earned rather than in the subsequent year in which such compensation was paid. Participants' contributions are credited to their accounts on this accrual basis.

C. The dividend chart set forth in paragraph 39 above submitted on behalf of the plaintiffs and the comparable Table G appearing in Schedule 1 of paragraph 41 above submitted on behalf of defendants are in agreement except with respect to dividends paid after December, 1947. The plain-

tiffs' chart sets forth all such dividends as being in the Fund on the date when they were actually paid to the Trustee and the defendants' table set them forth as being in the Fund as of the date of record of each dividend in accordance with an amendment made to the Plan in December, 194 (Ex. 37). Dividends are credited to the Dividend Account on this basis.

D. The difference in the year-end figures of Company excess profits contributions as shown in plaintiffs' chart in paragraph 40, on the one hand and Schedule 1, Table F, in paragraph 41, on the other hand, arises from the following circumstances:

(i) In plaintiffs' chart the year-end balance of Company contributions is shown on a cash receipt basis.

(ii) The year-end figures of Company contributions appearing in Table F of Schedule 1 in paragraph 41 above are taken from the books of account of the Fund maintained by the Administrative Committee of the Plan and are upon an accrual basis, that is to say, Company contributions have been treated as though they were in the Fund at the end of the year in which were earned the profits upon which such contributions were based rather than in the subsequent year in which such contributions were paid to the Trustee. Company contributions are credited to participants' accounts on this accrual basis.

The total credits of participants in the Plan as of December 31, 1950, the last year prior to the commencement of this action, and as of December 31, 1953 are shown below, together with the sources of these credits:

	December 31, 1950	December 31, 1953
Contributions to Fund by participants	\$29,219,507.64	\$35,951,800.00
Excess Profits Account	9,853,754.00	13,455,255.00
Dividend Account	9,942,832.23	12,888,282.00
Earnings, as defined in the Plan	732,132.10	618,308.00
Dividends credited by insurance companies to June 30	774,593.95	2,712,945.00
Total	<u>\$50,532,820.57</u>	<u>\$65,636,590.00</u>
Such credits were covered by:		
Cash on deposit	\$ 651,653.17	\$ 22,897.00
U. S. Government Securities (at cost plus accrued interest)	1,698,141.11	3,023,690.00
Dividends receivable on J.C. Penney Company stock	1,070,156.00	967,508.00
Interest receivable on investments		
Balance of contributions receivable from Company	889,800.00	908,471.00
Contributions receivable from participants	4,462,762.98	4,426,352.00
Payments to insurance companies for deferred annuities	38,007,865.00	51,219,831.00
Dividends credited by insurance companies to June 30	774,593.95	2,712,945.00
Less:	<u>\$47,554,973.07</u>	<u>\$63,311,695.00</u>
Amounts due to former participants	\$ 8,489.49	\$ 17,300.00
Accrued Expenses	13,894.31	7,800.00
	<u>22,383.80</u>	<u>25,101.00</u>
Balance, to be covered by future annual Company contributions measured by salaries under Article 6(a) of the Plan	<u>\$47,532,589.27</u>	<u>\$63,336,596.00</u>
On December 31, 1950 the Trustee held 535,078 shares of Penney Company stock (with market price of \$983,995) for distribution to participants reaching retirement status; on December 31, 1953 the Trustee held 483,754 shares (with market price of \$1,039,673). From the original block of 50,000 shares, the cost of which was covered by September, 1946, there remained, after giving effect to the three-for-one stock split in January, 1946, 85,078 shares on December 31, 1950 and on December 31, 1953, respectively; the balance of 414,676 shares is carried in the accounts of the Fund at its cost of	3,000,231.30	2,350,003.71
	<u>\$50,532,820.57</u>	<u>\$65,636,590.00</u>
Less: Reserve for Retirement Account to which Company's annual contributions measured by salaries under Article 6(a) of the Plan were credited aggregating	\$ 4,500,000.00	\$ 4,500,000.00
	1,499,763.70	2,149,996.29
	<u>\$ 3,000,231.30</u>	<u>\$ 2,350,003.71</u>

The status with regard to participation in the Retirement Plan of members of the Board of Directors of the Pennay Company during the period Dec. 31, 1940 through Dec. 31, 1951 is shown below:

Dec. 31, 1944	1945	1946	1947	1948	1949	1950	1951
Non-Participants	Non-Participants	Non-Participants	Non-Participants	Non-Participants	Non-Participants	Non-Participants	Non-Participants
Pennay Sams Eyer Buchnell Day	Pennay Sams Eyer Buchnell Day (resigned as Director Nov. 27) Herbert (from July 1) Rose (from July 1)	Pennay Sams Eyer Rushnell Herbert Rose	Pennay Sams Eyer Buchnell (resigned as Director July 1) Herbert Rose	Pennay Sams Eyer Herbert Rose	Pennay Sams Eyer Herbert Rose Binzen (from July 1)	Pennay Sams (died July 23) Eyer Herbert Ross Binzen Hughes (from July 1)	Pennay Eyer Herbert Ross Binzen Hughes (from July 1)
Participants	Participants	Participants	Participants	Participants	Participants	Participants	Participants
Herbert Rose Crocker Reynolds Binzen Hughes	Herbert (retired under Plan July 1) Rose (retired under Plan July 1) Crocker (died Aug. 2) Reynolds Binzen Hughes	Reynolds Binzen Hughes Bantz Brown	Reynolds (retired under Plan & resigned) Bantz as Director July 1) Binzen Hughes Bantz Mack & Schwamb (elected Directors July 1)	Binzen Hughes Bantz Brown Mack Schwamb	Binzen (retired under Plan July 1) Hughes Bantz Brown Mack Schwamb Torrey (elected Director Dec. 5)	Binzen (retired under Plan July 1) Bantz Brown Mack Schwamb Torrey	Hughes (retired under Plan July 1) Bantz Brown Mack Schwamb Torrey

unrecovered

Statement of Agreed Facts

Pre-trial Order

Pe 8481

42.

The individuals listed under the caption "Jan. 1, 1940 through Dec. 31, 1944" comprised the Board of Directors on December 5 and 6, 1939 when the Plan was adopted by the Board of Directors subject to the approval of the stockholders and on those dates and thereafter while they served as Directors, Messrs. Penney, Sams, Bushnell, Hyer and Day were ineligible to participate in the Plan because they were not receiving any remuneration for their services from the Company.

During the period 1940 through 1951 the participation of officers of the Company who did not serve as directors was as follows:

Mr. Raskopf, Secretary, participated from January 1, 1940 through 1951; Mr. Trown, Comptroller, participated from 1940 until his resignation November 30, 1945; Mr. Weideman, who was elected successor to Mr. Trown on November 30, 1945, participated from 1940 through 1951.

45.

The chart set forth below shows the regular salary, the compensation from the General Office Compensation Fund and the contributions to the Retirement Plan from such compensation, for the years of participation, of each person who served as a director or officer of the Penney Company during the period January 1, 1940 through December 31, 1951.

For Year		Penney Sams Bushnell Ryer Day	Herbert	Ross	Crocker	Reynolds	Binzen	Hughes	Bantz	Brown	Mack	Schwab	Torrey	Raskopf	Trown	Weideman
1939																
Salary	None		\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$ 7,000	\$10,000	\$ 8,500	\$ 7,125	\$10,000	\$10,000	\$ 9,000
Compensation	"		36,612	36,612	36,612	36,612	36,612	36,612	27,459	14,645	26,969	14,645	21,477	22,883	36,612	16,475
Plan Contrib.	"		12,204	12,204	12,204	12,204	12,204	12,204	9,000	-	8,989	1,000	-	3,500	12,204	5,491
1940																
Salary	None		10,000	9,166	10,000	10,000	10,000	10,000	10,000	7,000	10,000	10,000	8,575	10,000	10,000	9,000
Compensation	"		37,974	34,810	37,974	37,974	37,974	37,974	28,481	15,189	37,450	18,987	21,925	23,734	37,974	17,088
Plan Contrib.	"		12,658	11,603	12,658	12,658	12,658	12,658	9,493	5,063	12,483	6,329	7,308	7,911	12,658	5,696
1941																
Salary	None		10,000	9,166	10,000	10,000	10,000	10,000	10,000	7,750	10,000	10,000	9,375	10,000	10,000	9,000
Compensation	"		62,058	56,887	62,058	62,058	62,058	62,058	46,543	24,823	83,484	38,786	37,034	46,543	62,058	27,926
Plan Contrib.	"		20,686	18,962	20,686	20,686	20,686	20,686	15,514	8,274	27,828	12,928	12,344	15,514	20,686	9,308
1942																
Salary	None		10,000	10,000	10,000	10,000	10,000	10,000	10,000	8,416	10,000	10,000	9,733	10,000	10,000	6,750
Compensation	"		71,155	71,155	71,155	71,155	71,155	71,155	53,366	30,240	104,443	44,471	54,914	53,366	71,155	24,014
Plan Contrib.	"		14,231	14,231	14,231	14,231	14,231	14,231	10,673	6,048	20,888	8,694	10,982	10,673	14,231	4,802
1943																
Salary	None		10,000	10,000	10,000	10,000	10,000	10,000	10,000	8,874	10,000	10,000	10,000	10,000	10,000	7,500
Compensation	"		64,404	64,404	64,404	64,404	64,404	64,404	48,301	28,981	59,430	40,252	47,285	46,303	64,404	24,151
Plan Contrib.	"		12,880	12,880	12,880	12,880	12,880	12,880	9,660	5,796	11,886	8,050	9,457	9,660	12,880	4,830
1944																
Salary	None		10,000	10,000	10,000	10,000	10,000	10,000	10,000	9,666	10,000	10,000	10,000	10,000	10,000	9,000
Compensation	"		67,365	67,365	67,365	67,365	67,365	67,365	50,524	33,682	61,777	42,103	37,524	50,524	67,365	30,314
Plan Contrib.	"		13,473	13,473	13,473	13,473	13,473	13,473	10,104	6,736	12,355	8,420	7,504	10,105	13,473	6,062
1945																
Salary	None		5,860	5,860	5,905	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	9,166	9,500
Compensation	"		29,212	29,212	34,348	58,594	58,584	58,594	51,261	43,938	53,146	51,261	38,809	51,261	53,609	29,292
Plan Contrib.	"		None	None	None	11,716	11,716	11,716	10,252	8,787	10,628	10,252	7,761	10,252	None	5,658
1946																
Salary	None		None	None		10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"					69,092	69,092	69,092	69,092	69,092	69,092	69,092	69,092	69,092	69,092	43,162
Plan Contrib.	"					13,618	13,618	13,618	13,618	13,618	13,618	13,618	7,546	13,618		8,636
1947																
Salary	None		"	"		5,371	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"		"	"		32,996	66,173	66,173	66,173	66,173	66,173	66,173	57,970	66,173	66,173	49,630
Plan Contrib.	"		"	"		None	13,234	13,234	13,234	13,234	13,234	13,234	11,594	13,234		9,926
1948																
Salary	None		"	"		10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"		"	"		88,825	88,825	88,825	88,825	88,825	88,825	88,825	88,825	88,825	88,825	66,618
Plan Contrib.	"		"	"		17,765	17,765	17,765	17,765	17,765	17,765	17,765	17,765	17,765	17,765	13,323
1949																
Salary	None		"	"		10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"		"	"		75,990	75,990	75,990	75,990	75,990	75,990	75,990	75,990	75,990	75,990	75,990
Plan Contrib.	"		"	"		15,198	15,198	15,198	15,198	15,198	15,198	15,198	15,198	15,198	15,198	15,198
1950																
Salary	None		"	"		5,860	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"		"	"		46,472	93,200	93,200	93,200	93,200	93,200	93,200	93,200	93,200	93,200	93,200
Plan Contrib.	"		"	"		None	18,640	18,640	18,640	18,640	18,640	18,640	18,640	18,640	18,640	18,640
1951																
Salary	None		"	"		None	5,837	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
Compensation	"		"	"		"	42,217	84,666	84,666	84,666	84,666	84,666	84,666	84,666	84,666	84,666
Plan Contrib.	"		"	"		"	None	16,933	16,933	16,933	16,933	16,933	16,933	16,933	16,933	16,933
Stats to Retirement or Separation																
Salary			\$ 65,860	\$ 64,192	\$ 65,905	\$ 85,871	\$115,860	\$125,887							\$ 69,166	
Compensation			368,780	360,445	373,916	500,240	744,704	833,649							393,177	
Plan Contrib.			86,133	83,355	86,132	111,669	157,667	176,503							86,132	
Stats Retired - Separated																
			7-1-1945	7-1-1945	8-2-1945	7-1-1947	7-1-1950	7-1-1951							11-30-1945	

46.

Manager's contracts for 1939 and 1940 were identical with Exhibits 185 and 186, aside from the percentages shown on the first page of such Exhibits, and except that contracts for managers in stores whose sales were not expected to exceed \$600,000. contained no clause in paragraph Second (a) following the percentages shown nor the percentage figures listed on the reverse side of Exhibits 185 and 186 as applicable to sales over \$600,000.

* * * * *

49.

On July 22, 1941 the Board of Directors of the Penney Company in a meeting at which directors J. I. H. Herbert, G. H. Crocker, W. A. Reynolds, E. A. Ross, A. W. Hughes and F. W. Binzen were present adopted, with reference to subdivision (a) of Article 8, the resolutions set forth below (Ex. 13):

"The question was then presented to the meeting as to whether Mr. Dan Pearson, who has tendered his resignation as Manager of the Salem, Ohio, store and Mr. A. McAlpine, who has tendered his resignation as Manager of the Bellefontaine, Ohio, store and who as at July 1, 1941, were over 64 and 67 years of age, respectively, shall for the purposes of the Company's Profit-Sharing Retirement Plan for its Management Staff be considered as having retired pursuant to Paragraph 8(a) of the Plan, and accordingly eligible for a paid-up non-assignable annuity and shares of the stock out of the

Trust Fund. After discussion, it was agreed that their severance of their employment with the Company should not be considered as retirements but as a separation from the Company other than retirement, and that any other such cases occurring prior to January 1, 1945, shall likewise be determined to be separations other than retirements from active salaried employment for the purposes of the Plan, except that consideration may be given by the Board to cases where special circumstances of an unusual type may be involved in the severance of the employment with the Company where the participant shall have attained the age of sixty (60) years, and

Upon motion duly made, seconded and unanimously carried, it was

Resolved, That the resignation of Dan Pearson from the management of the Company's store at Salem, Ohio, and the resignation of A. McAlpine from the management of the Company's store in Bellefontaine, Ohio, who as at July 1, 1941, were over 64 and 67 years of age respectively, shall not be considered as retirement from active salaried employment for purposes of the Company's Profit-Sharing Retirement Plan for its Management Staff, and

Further Resolved, That for the purposes of said Plan, resignations up to January 1, 1945, of participants in the Plan who have attained, or attain, the age of sixty (60), shall likewise be considered as separations, other than retirements, from active salaried employment, except that the Board may

give consideration to the severance of employment with the Company by a participant who shall have attained the age of sixty (60) years in which there may be special circumstances of an unusual type involved."

50.

On December 5, 1944 the Board of Directors in a meeting at which directors J. C. Penney, E. C. Sams, George H. Bushnell, Wilk Hyer, G. H. Crocker, W. A. Reynolds, E. A. Ross, A. W. Hughes and F. W. Binzen were present adopted, with reference to subdivision (c) of Article 8, the resolutions set forth below (pp. 1565-66 of Ex. 23):

"Mr. Hughes then stated that inquiries have been received from a number of store managers who will have attained the age of 55 but not the age of 60 years during 1945, as to whether the Company will permit their retirement under Provision 8(c) of the Management Staff Profit-Sharing Retirement Plan, with full retirement benefits. Reference was made to the fact that in connection with the cases of Messrs. Pearson and McAlpine, who resigned from store management in 1941 and who were then over 60 years of age, the Board held that their resignations would not be considered for Plan purposes as 'Retirements From Active Salaried Employment' under Provision 10.A., and they accordingly received, in cash, the amounts standing to their credit in the Trust Fund in accordance with Provision 10.B. At that time the Board also held that, for purposes of the Plan, resignations up to January 1, 1945, of participants who have attained,

the first day of July in the year in which they reach age sixty, and that the discretionary power granted the directors in the Plan to permit retirement with such benefits of a participant who has attained the age of fifty-five years shall be exercised only when exceptional circumstances would warrant. Mr. Hughes stated that inquiries have been received from participants on this matter, and asked how such inquiries should be handled.

After discussion, it was agreed that replies to such inquiries in line with the Directors' decision should be made by Mr. Hughes, and

Upon motion duly made, seconded and unanimously carried, it was

Resolved, That inquiries as to whether a participant in the Plan would be permitted to retire after age fifty-five and before age sixty and receive an annuity and stock shall be answered by Mr. Hughes in line with the decision of the Board of Directors made in its meeting of December 5, 1944, as hereinabove referred to."

52.

Article 17 of the Plan as distributed to participants in 1940 read as follows:

"17. The Board of Directors shall have the right to alter, modify, or amend in whole or in part, any of the provisions of this or any incidental plan, provided, however, that such alterations, modifications, or amendments shall not in any way be in contravention of the provisions of Article '16.'"

Article 16 of the Plan read as follows:

"16. J. C. Penney Company does not guarantee

any of the benefits provided in this Plan, but contributions once made by the Company shall be irrevocable and no part of the Fund in the possession of the Trustee, excepting so much of the moneys for which it may be reimbursed for expense of operation of the plan, shall ever revert to the Company or be diverted to or used for any purposes other than for the exclusive benefit of eligible employees covered by the Plan."

There has been no change in Articles 16 or 17 of the Plan since the distribution of the Plan and Trust Agreement (Ex. 125) in 1940, except that on February 24, 1948, following preparation of contracts for the purchase of deferred annuities from four insurance companies, the Board of Directors of the Penney Company amended Article 16 to add after the words "benefits provided in this Plan" the words "or contemplated by the terms of any contract entered into with an insurance company or companies for the purchase of retirement annuities" (Item 13. pp. 1806-07 of Ex. 39).

53.

On May 25, 1948 the Board of Directors of the Penney Company in a meeting at which directors E. C. Sams, J. I. H. Herbert, E. A. Ross, A. W. Hughes, F. W. Binzen, J. F. Brown, F. A. Bantz, G. E. Mack, H. H. Schwamb were present adopted the following resolution (pp. 1825-27 of Ex. 40):

"Mr. Hughes then brought up for discussion the question of the elimination of the provision in the Company's Profit-Sharing Retirement Plan (for

Management Staff) under which it is optional with the Company, in the discretion of the Board of Directors, to permit retirement of participants who have attained, or attain, the age of 55 years. He stated that while this provision of the Plan became effective January 1, 1945, no participant has been granted permission to retire before age 60 with full Plan benefits, that is, a paid-up non-assignable annuity and shares of stock from the block of stock held by the Trustee of the Plan for distribution to retiring participants. Mr. Hughes also stated that the matter had been considered on a number of occasions and that District Managers and those who may have inquired have been informed that retirement with full benefits would not be permitted before a participant reaches age 60. He therefore recommended, since it is not contemplated that retirements at age 55 will be permitted, that the provision contained in Article 8(c) of the Plan be deleted. After discussion, it was agreed that such recommendation should be adopted, and

Upon motion duly made, seconded and unanimously carried, it was

Resolved, That the Profit-Sharing Retirement Plan (for Management Staff) be, and it hereby is amended by deleting Article 8 and substituting therefor the following Article:

8. Retirement of participating employees shall be governed by the following condition:

(a) Retirement shall be compulsory for those

participants who have attained or attain the age of 60 years, except that in special cases the Board of Directors, in its discretion, may delay from year to year the separation of any such employee from the company's employment, but such persons must, nevertheless, withdraw from participation in the Plan at the retirement age of 60 years.

(b) The applicable retirement age for compulsory retirement of all participants shall be deemed to have been reached on the first day of July of the calendar year in which he or she attains such age.

(c) A participant shall be deemed to have attained a given age under the Plan on the first moment of the anniversary of his birth corresponding to such age.

and by deleting the last sentence set forth under (a) of the provision at the end of the plan captioned "Effective Dates:" which reads as follows:

However, if any participant shall cease active employment prior to July 1, 1942 his or her own contributions to the Fund from 1939 compensation and other participants' contributions to the Fund from 1939 compensation shall not be used in measuring the number of shares of the J. C. Penney Company common stock to which he or she is entitled in any retirement settlement.

and

Further Resolved, That the foregoing amendment shall be effective May 25, 1948."

There has been no amendment to Article 8 of the Plan since May 25, 1948.

* * * * *

55.

After the Group Annuity Contracts became effective, plaintiffs Wells and Albertsen and all other participants received from the Administrative Committee of the Retirement Plan a booklet issued by the Committee entitled "Outline of Benefits Under & Provisions of Group Annuity Contracts Effective March the First, 1948" (Ex. 280).

56.

On or about August 25, 1949, the Administrative Committee of the Retirement Plan issued to all participants a new booklet entitled "J. C. Penney Company Profit-Sharing Retirement Plan (for Management Staff)" (Ex. 127) containing, among other things, the Plan and Trust Agreement as amended. The only amendments which have been made to the Plan since the distribution of such booklet are the amendments to Article 6(b) and Article 9 of the Plan (pp. 2000, 2004 to 2006 of Ex. 51), made in December 1950, effective January 1, 1951.

57.

There was no withdrawal by any participant over 60 under the Plan during the calendar year 1940. During the period between January 1, 1941 and July 1, 1945, participants who were over 60 with birth date as shown below and whose participation ceased on the dates shown below opposite the name

of each, had at the time of ceasing participation personal contributions and total credits in the Fund as shown. There is also shown, except in the case of those participants whose participation ceased on account of death, the shares of J. C. Penney Company stock each participant would have received had he reached retirement status on July 1 of the year of his separation.

NAME	Position	Date Out	Date of Birth	Personal Contributions at Time of Leaving	Total Plan Credits at Time of Leaving	Shares of Stock	See Footnote
S. J. Foote Dan Pearson A. F. Alpize	SM - # 381, Ottava, Kansas	3/31/41	5/ 8/79	\$ 678.60	\$ 784.87	43	129
	SM 445, Salem, Ohio	6/30/41	12/11/76	2,437.77	2,623.65	75	225
	SM 349, Bellefontaine, Ohio	8/31/41	8/20/73	4,278.38	4,635.05	146	438
J. T. Chambers C. A. Wharton R. D. Dickinson	SM 132, Salem, Oregon	12/31/41	10/12/80	13,514.90	16,348.36	253	759
	SM 716, Lufkin, Texas	4/11/42	11/15/80	1,967.89	2,539.06	37	111
	SM 107, Eugene, Oregon	12/31/42	10/15/82	16,622.40	22,711.74	229	637
	SM 527, Pottstown, Penna.	2/28/43	8/ 4/77	7,203.64	9,763.65	98	297
B. E. Fuzz E. T. Shinogle	SM 305, Lorain, Ohio	5/22/43	2/14/80	9,684.95	13,186.47	Deceased	
	SM 961, Bluffton, Indiana	6/30/43	10/12/82	2,894.67	4,041.12	40	120
	SM 833, Glasgow, Montana	7/20/43	9/11/78	7,755.10	10,385.08	107	321
J. A. Graver T. S. Willis P. W. Bearer	SM 822, Penseleuer, Ind.	8/31/43	5/ 2/74	5,980.88	8,180.10	82	246
	SM 1119, Torrington, Wyo.	9/29/43	9/11/77	4,145.19	5,811.14	Deceased	
	SM 497, Petersburg, Va.	6/ 2/44	4/14/81	20,670.02	29,810.45	Deceased	
Chas. Ealer H. C. Hoagland O. A. Cieseler	SM 155, Salt Lake City, Utah	6/17/44	8/28/79	43,694.56	63,101.46	Deceased	
	SM 350, Winona, Minn.	6/30/44	12/14/81	8,555.87	12,577.61	98	294
	Buyer - Dept. H. - New York	11/12/44	4/ 5/84	34,371.44	50,712.83	Deceased	
M. D. Warner G. C. Taylor	SM - # 204, Kirkeville, Mo.	2/26/45	3/15/82	7,827.78	11,468.40	Deceased	

FOOTNOTE: Shares in preceding column multiplied by three to allow for the three-for-one stock split January 16, 1946. (See paragraph 10 above)

The column headed "Shares of Stock" indicates the number of shares of J. C. Penney Company stock, on the basis of the personal contributions shown, the participant would have received had he reached retirement status on July 1 of the year of his separation. Where the separation occurred before July 1 of a year, the participant's personal contributions were assumed to have been in the Fund on July 1. Where the separation occurred on December 31 of a year, the assumption has been made that the participant reached retirement status on the July 1 of the succeeding year since the amount of his personal contributions shown includes those based on compensation earned in the year of separation and paid into the Fund in the next year.

The following example illustrates the method used in computing the number of shares of stock shown above and in making the similar computations in the chart set forth in paragraph 60, V. S. Wennersten being the participant used in this example.

Total of participants' contributions in	
Fund July 1, 1943.....	\$10,860,627.96
Aggregate personal contributions of Messrs.	
Dickinson, Wennersten, Huse and	
Shinogle from above.....	36,405.66
<hr/>	
Revised total of participants' contributions	
in Fund July 1, 1943.....	10,897,033.62
Wennersten's contributions	
at time of leaving.....	\$ 7,203.64 = 00.0661064%
<hr/>	
Revised total participants'	
contributions	\$10,897,033.62
00.0661064% of 150,000 shares equals 99 shares.	

Participants' contributions from 1939 compensation have been excluded in computing the number of shares of stock shown for Messrs. Foote, Pearson and McAlpine in accordance with the provisions of the Plan on page 36 under the caption "Effective Dates" since their dates of separation occurred before July 1, 1942 and they have been considered to have retired on July 1, 1941, for such computations.

58.

There is shown below the names of those participants who were over 60 or who attained age 60 during the period between January 1, 1941 and January 1, 1945, and who reached retirement status on July 1, 1945, together with their personal contributions and total credits in the Fund on that date and the number of shares of J. C. Penney Company stock they received.

B. C. Goss	Dept. Z - New York	6/13/84	\$ 15,076.83	98
J. I. H. Herbert	Director, Vice President & Treasurer	2/3/82	6,362.81	42
J. M. Johnson	Head Buyer - Dept. A - New York	2/4/84	127,256.17	830
L. A. Martin	Asst. Sales Mgr. - New York	2/7/84	79,533.60	519
B. A. Ross	Director - Head Real Estate & Construction	12/2/83	79,379.89	510
L. M. Szymon	SM - Store # 54, Gallup, N. M.	12/2/83	123,320.85	803
J. T. Mahan	SM " 89, Fort Madison, Iowa	4/11/84	6,461.54	82
H. A. Hansen	SM " 142, Virginia, Minn.	3/15/83	12,506.53	82
R. E. Finney	SM " 158, Paris, Texas	4/22/82	12,159.02	80
A. M. Kibly	SM " 191, Enid, Okla.	3/22/79	7,984.88	54
C. M. Coleman	SM " 206, Parkersburg, W. Va.	6/17/84	14,893.81	95
G. H. Kennedy	SM " 213, Miami, Okla.	2/8/84	13,134.15	127
J. B. Atkinson	SM " 225, Fond du Lac, Wisc.	10/10/84	19,781.45	87
M. H. Hanafield	SM " 255, Tucson, Ariz.	10/29/84	13,287.40	110
S. E. Axe	SM " 319, Spencer, Iowa	11/29/81	15,867.75	153
C. F. Stadtfeld	SM " 363, Watertown, R. D.	6/20/82	23,131.17	203
L. J. Hinkel	SM " 398, New Castle, Ind.	12/15/79	35,119.07	99
J. M. Moffatt	SM " 411, Coshocton, Ohio	11/12/83	15,675.73	151
R. E. Auble	SM " 465, Wray, Colorado	8/6/84	12,468.57	120
Z. C. Buech	SM " 469, McKeesport, Penna.	10/30/80	14,131.12	90
J. M. Higginbotham	SM " 477, Peru, Indiana	2/26/84	2,975.01	29
C. F. Sutherland	SM " 534, LaGrange, Ga.	12/2/79	15,951.77	154
O. S. Welch	SM " 540, Winfield, Kansas	6/30/84	5,350.93	52
D. C. Book	SM " 605, Alexandria, Va.	11/15/83	9,747.81	94
E. F. Fehrendorf	SM " 641, Sioux Falls, S. D.	2/9/84	2,408.76	25
Y. S. Davies	SM " 660, Denver, Colorado	1/3/84	30,457.50	294
X. G. Cornell	SM " 665, Albion, Michigan	7/18/83	25,729.92	248
R. R. Kinton	SM " 741, Martinsville, Ind.	6/20/84	11,755.52	113
H. O. Boelter	SM " 846, Montevideo, Minn.	3/27/84	6,782.06	65
L. M. Lerberg	SM " 879, Hutchinson, Minn.	12/25/82	6,239.77	60
T. E. Andrew	SM " 959, Banning, California	12/13/84	5,004.39	48
L. D. Mutter	SM " 1007, Weston, W. Va.	11/2/82	7,120.13	48
R. E. Cain	SM " 1050, Plainview, Texas	5/31/83	10,379.73	68
C. A. Nelson	SM " 1079, Redwood City, Calif.	10/25/83	2,927.54	28
R. A. Finney	SM " 1081, Coleman, Texas	11/6/78	3,663.14	35
H. A. Trost	SM " 1090, Santa Cruz, Calif.	7/29/83	5,777.51	78
H. V. Woods	SM " 1197, Sargent, Nebraska	12/31/82	8,493.60	55
O. Paris	SM " 1272, Tupelo, Miss.	11/24/82	6,886.45	66
J. O. Chamberlain	SM " 1299, Florence, Colo.	9/23/84	2,097.11	20
		3/23/79	5,577.03	54
			2,400.00	23
			3,460.64	

FOOTNOTES: On January 16, 1946, the Company, in its three-for-one stock split, issued to the above individuals two additional shares for each of the shares set opposite their names then held by them.

During the period from January 1, 1945 to July 1, 1949,

168

participants who were over 55 at the time of ceasing participation on the dates shown, with birth dates as shown, had personal contributions and total credits in the Fund as shown below. There is also shown, except in the case of those participants whose participation ceased on account of death, the shares of J. C. Penney Company stock each participant would have received had he reached retirement status on July 1 of the year of his separation.

NAME	Position	Date Out	Birth	Leaving	Stocks	Footnote
J. W. Stuebs	SM - # 450, Atlantic, Iowa	12/31/44	7/1/87	\$ 5,629.82	\$ 8,138.75	54 162
J. B. Carpenter	SM 534, Cape Girardeau, Mo.	5/15/45	5/1/87	11,373.93	16,815.84	109 327
J. G. Duns	SM 1295, Council Grove, Kans.	6/30/45	3/23/90	2,353.29	3,997.68	53 69
J. G. Collan	SM 1295, Council Grove, Kans.	7/14/45	4/1/90	11,089.42	16,862.41	107 321
C. E. Crocker	Director - Gen. Mgr. of Subsidiary	8/2/45	7/19/87	86,133.73	127,256.17	Deceased
J. W. Irwin	SM - # 371, Marquette, Michigan	11/7/45	9/1/88	4,767.17	7,231.67	46
J. A. Henry	SM 176, Greenwood, Texas	12/6/45	1/15/89	13,661.53	20,272.29	Deceased
J. A. Snell	SM 38, Eaton, New Mexico	12/31/45	8/11/90	3,532.30	5,244.16	9723
J. O. Olson	SM 380, Kelso, Washington	12/31/45	7/21/90	6,235.36	9,465.44	171
J. L. Johnson	Accounting Dept - New York	12/31/45	7/2/86	9,754.63	14,705.18	267
J. L. Tucker	SM - # 600, Bellevue, Ohio	1/30/46	4/13/90	3,809.83	5,717.94	104
J. L. Dells	SM 174, Pocatello, Idaho	6/30/46	8/29/90	16,043.25	24,598.84	439
J. L. Perry	SM 146, Las Vegas, Nevada	2/28/46	2/28/91	16,277.02	25,863.07	445
J. E. Mahine	SM 669, Springfield, Minn.	12/31/46	6/31/89	1,666.56	2,512.84	39
J. F. McLean	SM 661, Childress, Texas	12/31/46	2/22/98	10,972.59	17,623.82	266
J. F. Jefferson	SM 783, Idaho Falls, Idaho	12/31/46	5/17/91	17,623.59	27,802.42	427
J. V. Wallman	SM 1385, Bishop, California	6/30/47	6/16/92	4,623.89	7,477.21	112
J. H. Swisher	SM 154, Oakland, California	6/30/47	2/29/92	56,134.60	91,578.18	1359
J. C. Halbert	Buyer - Dept. F - New York	8/31/47	12/18/91	69,793.26	111,697.38	1690
J. A. Meleon	SM - # 551, Tyler, Texas	12/31/47	1/14/92	12,623.22	20,273.31	281
J. G. Johnson	SM 1020, Houston, Texas	12/31/47	12/15/90	75,543.86	123,616.72	1684
J. C. Campbell	SM 1436, Indianapolis, Ind.	12/31/47	10/7/92	51,145.19	83,778.02	1140
J. C. Deal	SM 2576, Greenville, Calif.	3/31/48	8/30/91	6,014.47	13,300.13	179
J. F. Ruess	SM 575, Florence, Illinois	4/15/48	6/21/92	4,076.24	6,599.15	91
J. E. Reubolt	SM 158, Stockton, Calif.	8/28/48	4/10/90	49,798.85	80,964.37	Deceased
J. E. Draper	SM 195, Webster City, Iowa	10/24/48	6/22/90	7,310.03	11,834.65	Deceased
H. L. Jordan	SM 343, New Ulm, Minnesota	11/10/48	2/10/90	9,108.98	15,037.60	Deceased
H. F. Jorgensen	SM 461, Aberdeen, So Dakota	12/31/48	8/6/92	10,465.17	17,763.88	203
C. F. Bush	SM 320, Keosau, Iowa	5/18/49	9/18/93	20,038.83	33,756.65	Deceased
J. A. Burkitt	SM 217, Portland, Oregon	6/30/49	1/5/93	83,894.64	146,310.09	1629

The column headed "Shares of Stock" indicates the number of shares of J. C. Penney Company stock, on the basis of the personal contributions shown, the participant would have received had he reached retirement status on July 1 of the year of his separation. Where separation occurred before July 1 of a year, the participant's personal contributions were assumed to have been in the Fund on July 1. Where the separation occurred on December 31 of a year, the assumption has been made that the participant reached retirement status on the July 1 of the succeeding year since the amount of his personal contributions shown includes those based on compensation earned in the year of separation and paid into the Fund in the next year.

Recommencing with P. A. Bush, the number of shares reflects the three-for-one split of the Company's stock on January 16, 1946.

NOTES: Shares in preceding column multiplied by three to allow for the three-for-one stock split January 16, 1946. (See paragraph 10 above)

The names of the participants totaling 134 who reached retirement status in the years 1945 through 1949, together with the credits in the Fund of each and the number of shares of stock they received from the Fund, are shown on Exhibits 67 through 71.

61.

The chart set forth below shows the participation in and withdrawals from the Plan during the period January 1, 1940 through December 31, 1953, with the number of participants who separated for reasons other than retirement segregated by the age brackets shown.

Beginning of Year	<u>Participants</u>					<u>Other</u> 8	
	<u>Withdrawing</u>				<u>End of Year</u>	<u>Under 35</u>	
	<u>New</u>	<u>Death</u>	<u>Retire- ments</u>	<u>Other Reasons</u>		<u>Death</u>	<u>Other Reasons</u>
,716*	-	1		3	1,712	-	-
,712	102	5		78	1,731	1	7
,731	120	3		59	1,789	-	3
,789	57	9		38	1,799	-	-
,799	72	6		50	1,815	-	-
,815	85	8	50	70	1,772	-	-
,772	134	10	17	86	1,793	-	1
,793	141	6	16	79	1,833	-	4
,833	113	13	23	67	1,843	-	1
,843	135	7	28	70	1,873	-	-
,873	117	10	30	58	1,892	-	1
,892	114	8	35	59	1,904	-	-
,904	146	7	40	64	1,939	-	-
,939	<u>118</u>	<u>9</u>	<u>33</u>	<u>60</u>	1,955	<u>-</u>	<u>-</u>
	1,454	102	272	841		1	17

Participants initially in the Plan.

62.

On July 1, 1949, after distribution of shares to participants who retired on July 1 of the years 1945 through 1949, the Trustee held in the Fund 547,657 shares of J. C. Penney Company common stock for distribution to retiring participants. If each person (other than those shown as deceased) listed in paragraphs 57 and 59 had been permitted to retire under Article 8(a) or 8(c), the number of shares remaining in the original 50,000 share block on July, 1949 would have been 82,390 shares, after giving effect to the three for one split on January 16, 1946.

63.

On July 1, 1951, after distribution of shares to participants who retired on July 1 of the years 1945 through 1951, the Trustee held in the Fund 519,901 shares of J. C. Penney Company common stock for distribution to retiring participants. If each person (other than those shown as deceased) listed in paragraphs 57 and 59 had been permitted to retire under Article 8(a) or 8(c), the number of shares remaining in the original 50,000 share block on July 1, 1951 would have been 54,634 shares, after giving effect to the three for one split on January 16, 1946.

64.

On or about November 12, 1940 the United States Treasury Department issued a ruling that the Retirement Plan met the requirements of Section 165 of the Internal Revenue Code and therefore quali-

fied as an employees' trust entitled to exemption from Federal income taxes (Ex. 310). Subsequent to the amendment of Section 165 by the Revenue Act of 1942, the Treasury Department on or about December 21, 1944 issued a ruling that the Plan met the requirements of Section 165(a) of the Internal Revenue Code as amended and therefore qualified as an employees' trust entitled to exemption from Federal income taxes (Ex. 311). The Treasury Department has also determined that amendments to the Plan submitted to it from time to time do not affect the Plan's continued qualification as an employees' trust entitled to exemption from Federal income taxes under the applicable provisions of Section 165 of the Internal Revenue Code (Ex. 312 A through D), and the Plan has so qualified at all times since its adoption.

65.

Plaintiff Wells, during the period of his participation in the Plan from January 1, 1940, to August 31, 1948, received from the Penney Company regular salary totaling \$29,955.00 and in addition Manager's Contract Compensation totaling \$56,924.-22. Plaintiff Wells, as permitted by the terms of the Plan, contributed to the Trust Fund under the Plan \$1,989.23 from his Contract Compensation for 1939. From his Contract Compensation for the years 1940 through 1947, plaintiff Wells, as required by the terms of the Plan, contributed to the Trust Fund under the Plan a total of \$11,904.47. The contribution made by plaintiff Wells from his

compensation for 1939, 1940 and 1941 was 331 $\frac{1}{3}$ % of his compensation for those years; for the years 1942 through 1947 it was 20%. Plaintiff Wells made no contribution to the Retirement Plan from his Contract Compensation for 1948 because such compensation was not for the full calendar year 1948 (Article 4, p. 24 of Ex. 125).

66.

While he was a participant in the Plan plaintiff Wells, in accordance with the provisions of Article 23 of the Plan (p. 34 of Ex. 125), received from the Administrative Committee of the Plan for each of the years 1940 through 1947 an annual statement of his account setting forth all of the credits to his account at the end of the year covered by the statement together with the source of such credits. With respect to each such statement plaintiff Wells executed and returned to the Administrative Committee a certificate in which he certified that the amounts of his own contributions were correctly stated (Ex. 254 A through H).

67.

On ceasing participation in the Retirement Plan on August 31, 1948, plaintiff Wells had total credits in the Fund of \$22,563.48 (Ex. 252), consisting of:

A.	the total of his own contributions	
	amounting to	\$13,929.70
B.	his share of the Company's excess profit contributions	
	through 1947 amounting to.....	4,075.52
C.	his share of the Dividend Account at	
	August 31, 1948, amounting to.....	4,558.26
		<hr/>
	Total	\$22,563.48

All these credits were used to purchase for him installment refund annuities under which payments would commence on August 1, 1955, the year in which he would be 60 (Ex. 249).

68.

Under the terms of the Retirement Plan and the Group Annuity Contracts, plaintiff Wells elected to cancel all the installment refund annuities so purchased for him and to receive his total credits of \$22,563.48 in cash (Ex. 251).

69.

Pursuant to his election under the terms of the Retirement Plan and the Group Annuity Contracts, plaintiff Wells received the \$22,563.48 from the Aetna Life Insurance Company on or about October 15, 1948 (Ex. 252); and on or about April 1, 1949 received the additional sum of \$643.83 representing his share of the distribution of the Reserve for Depreciation of Assets to which Fund earnings had been credited (Ex. 253).

70.

Plaintiff Albertsen during the period of his participation in the Plan from January 1, 1940 to December 31, 1950, received from the Penney Company regular salary totaling \$48,900.00 and in addition Manager's Contract Compensation totaling \$137,052.71. From such Contract Compensation plaintiff Albertsen, as required by the terms of the Plan, contributed to the Trust Fund under the

Plan a total of \$30,213.13. Plaintiff Albertsen did not make any contribution under the Plan from his Contract Compensation for 1939 although permitted to do so under the terms of the Plan. The contribution made by plaintiff Albertsen from his compensation for 1940 and 1941 was $33\frac{1}{3}\%$ of his compensation for those years; for the years 1942 through 1950 it was 20%.

71.

While he was a participant in the Plan plaintiff Albertsen, in accordance with the provisions of Article 23 of the Plan (p. 34 of Ex. 125; p. 14 of Sec. IV of Ex. 127), received from the Administrative Committee of the Plan for each of the years 1940 through 1949 an annual statement of his account setting forth all of the credits to his account at the end of the year covered by the statement together with the source of such credits. With respect to each such statement plaintiff Albertsen executed and returned to the Administrative Committee a certificate in which he certified that the amounts of his own contributions were correctly stated (Ex. 282 A through J).

72.

On ceasing participation in the Retirement Plan on December 31, 1950, plaintiff Albertsen had total credits in the Fund of \$52,967.81 (Ex. 215 D), consisting of:

A.	the total of his own contributions amounting to	\$ 30,213.13
B.	his share of the Company's excess profit contributions through 1950 amounting to.....	10,386.23
C.	his share of the Earnings credit through 1950 amounting to.....	1,104.89
D.	his share of the Dividend Account at December 31, 1950, amounting to.....	\$ 10,280.94
E.	his share of insurance companies' rate credits (dividends) under the Group Annuity Con- tracts amounting to.....	982.62
Total		<hr/> \$52,967.81

All these credits were used to purchase for him installment refund annuities under which payments would commence on August 1, 1956, the year in which he would be 60, which annuities are still in force. Plaintiff Albertsen's share of the rate credits (dividends) paid by the insurance companies in 1951, which share amounted to \$1,094.66, was applied by them as premium for additional installment refund annuities for him under which payments would commence on August 1, 1956 (Ex. 317) and such additional annuities are still in force.

73.

Neither plaintiff Wells nor plaintiff Albertsen at any time prior to the commencement of this action made any objection to the accounts or proceedings covered by either the annual statements of their accounts furnished to them (Ex. 254 A through H; Ex. 282 A through J) in accordance with Article 23 of the Plan or to the statements of the accounts of the proceedings of the Trustee

(Exs. 129 through 135 as to Wells: Exs. 129 through 138 as to Albertsen) which, as the plaintiffs were advised in their annual statements of account, were available for their inspection as provided in Article 23 of the Plan (p. 34 of Ex. 125; also as to Albertsen p. 14 of Sec. IV of Ex. 127).

74.

Each participant in the Plan in accordance with the provisions of Article 23 of the Plan (p. 34 of Ex. 125) received from the Administrative Committee of the Plan for each of the years of his participation in the Plan (except for the year in which his participation ceased) an annual statement of his account, in form similar to the annual statements of their accounts furnished to plaintiff Wells and plaintiff Albertsen (Ex. 254 A through H; Ex. 282 A through J), setting forth all of the credits to his account at the end of the year covered by the statement and the source of such credits. With respect to each such statement received each participant executed and returned to the Administrative Committee a certificate in which he certified that the amounts of his own contributions were correctly stated. No participant at any time prior to the commencement of this action made any objection to the accounts or proceedings covered by either the annual statement of his account furnished to him in accordance with Article 23 of the Plan or to the statements of the account of the proceedings of the Trustee which, as each participant was advised in his annual statement of ac-

count, were available for his inspection as provided in Article 23 of the Plan (p. 34 of Ex. 125; p. 14 of Sec. IV of Ex. 127).

75.

Glyndon H. Crocker and G. H. Crocker were the names used by the same individual, G. H. Crocker.

Walter A. Reynolds, Sr., and W. A. Reynolds are the names of the same individual, W. A. Reynolds.

Earl A. Ross and E. A. Ross are the names of the same individual, E. A. Ross.

Albert William Hughes, Albert W. Hughes and A. W. Hughes are the names of the same individual, A. W. Hughes.

Frederick William Binzen and F. W. Binzen are the names of the same individual, F. W. Binzen.

August J. Raskopf and A. J. Roskopf are the names of the same individual, A. J. Raskopf.

Herbert Hadley Schwamb, Herbert H. Schwamb and H. H. Schwamb are the names of the same individual, H. H. Schwamb.

Frederick A. Bantz, Fred A. Bantz and F. A. Bantz are the names of the same individual, F. A. Bantz.

Robert Charles Weiderman and R. C. Weiderman are the names of the same individual, R. C. Weiderman.

76.

Plaintiff Harvey L. Wells was born on September 24, 1896.

Plaintiff Harry J. Albertsen was born on April 6, 1896.

77.

No participant under the Plan had any right to continued employment by the Penney Company.

78.

Any participant could be discharged by J. C. Penney Company without cause at any time prior to acquiring retirement status.

* * * * *

80.

Each participant in the Plan, including plaintiffs, whose participation ceased prior to reaching retirement status received from the Trust an amount equal to the aggregate of his own contributions and in addition the other credits from the Fund to which he was entitled under the Plan, either in cash or in annuities surrenderable for cash.

81.

Plaintiffs at all times during their respective periods of participation in the Plan, commencing in 1940, knew that the Plan provided that only participants reaching retirement status as defined in the Plan would be entitled to receive shares of the J. C. Penney Company stock held by the Trustee.

82.

No participant whose participation in the Retirement Plan terminated because of death or any other reason before attaining the compulsory retirement age of 60, as defined in the Plan, has

received any of the shares of J. C. Penney Company stock held by the Trustee in the Plan.

Agreed Propositions of Law

1.

The Penney Company could, while the Plan was in effect, discharge a store manager or any other participant, without cause.

2.

The Plan and Trust Agreement are to be construed in accordance with the laws of the State of New York.

3.

The Penney Company qualified the Plan under Section 165 of the Internal Revenue Code.

Stipulation Re Contentions and Issues

It is agreed by all parties that the classification of the Contentions and Issues which follows hereafter as being Contentions or Issues of Law or Fact is intended for the convenience of the Court and parties, and such classification shall not prejudice any rights of the parties.

Plaintiff's and Defendants' Contentions of Fact and Law, all Answers and Countercontentions thereto, all replies to Countercontentions of Fact or Law, and the Issues of Fact and Law raised in respect to such Contentions and Countercontentions are submitted herewith subject to the right of any party to object at the trial to the relevance or materiality of any or all such Contentions, Answers, Countercontentions, Replies and Issues.

Plaintiffs' Contentions of Fact

1.

Plaintiffs contend that the Plan was an inducement to the managers of its stores and the other members of its management staff to continue in the employment of Penney Company.

2.

Plaintiffs contend that plaintiffs and the other managers and members of the management staff, in reliance upon the Plan and its provisions, continued in the employment of Penney Company.

3.

Plaintiffs contend that the opportunity to receive stock upon retirement was the chief inducement for the managers of stores and members of the management staff to remain in the employment of Penney Company.

4.

Plaintiffs contend that the 200,000 shares of J. C. Penney Company stock were purchased by the Trustee acting for and on behalf of plaintiffs and all other then participants.

5.

Plaintiffs contend that the 200,000 shares of J. C. Penney Company stock acquired by the Trustee were purchased by the Trustee with the funds and upon the financial responsibility of plaintiffs and the other then participants.

6.

Plaintiffs contend that all the funds and moneys

used to pay for the 200,000 shares of J. C. Penney Company stock were the funds and moneys of plaintiffs and the other then participants.

7.

Plaintiffs contend that all the funds borrowed by the Trustee from Continental Bank were borrowed upon the security of assets and funds owned by the plaintiffs and the other then participants.

8.

Plaintiffs contend that all the sums used to repay the loan, and accrued interest thereon, procured by the Trustee from Continental Bank, were the funds and moneys of plaintiffs and the other then participants.

9.

Plaintiffs contend that the death of a participant resulted in the forfeiture of any shares of stock to which such participant would have been entitled upon reaching retirement status, and that the shares so forfeited remained in the Fund for distribution to other participants.

10.

Plaintiffs contend that the discharge of a participant resulted in the forfeiture of any shares of stock to which such participant would have been entitled upon reaching retirement status, and that the shares so forfeited remained in the Fund for distribution to other participants.

11.

Plaintiffs contend that the voluntary withdrawal of a participant for any reason resulted in the for-

feiture of any shares of stock to which such participant would have been entitled upon reaching retirement status, and that the shares so forfeited remained in the Fund for distribution to other participants.

12.

Plaintiffs contend that the shares of stock constitute a prize which was to be awarded to such participants as were fortunate enough to live until attaining retirement status, and to be in good health until attaining retirement status, and to not be discharged prior to attaining retirement status.

13.

Plaintiffs contend that the possibility of death, illness, and discharge were hazards and chances assumed by each participant whose contributions and earnings were used in the acquisition of the shares of J. C. Penney Company stock.

14.

Plaintiffs contend that 4 per cent of the value of the shares of stock of J. C. Penney Company which are found by the Court to have been acquired by the Trustee by the use of the contributions and earnings of the Plaintiffs and those for whom plaintiffs prosecute this action is the reasonable value of the services of plaintiffs' attorneys in instituting and prosecuting this action.

15.

At the time of the inception of the Plan and of

becoming participants in the Plan and Trust, Plaintiffs were not advised of any illegality in any portion of the Trust Agreement, and plaintiffs were not so advised until within the two months immediately prior to the institution of the present suit, which was after the employment of their present counsel and consultation with such counsel.

Defendants' Answers and Countercontentions of
Fact to Plaintiffs' Contentions of Fact

1.

Defendants admit plaintiffs' Contention of Fact No. 1, but defendants contend that the Plan was one among many other factors, including those set forth in the defendants' Answer and Countercontention to plaintiffs' Contention of Fact No. 2 below, which motivated managers of the Penney Company stores and other members of its management staff to continue in its employ.

2.

Defendants deny plaintiffs' Contention of Fact No. 2. Defendants contend that the plaintiffs and other members of the management staff of the Penney Company continued in the employment of the Penney Company for many years when there was no Profit-Sharing Retirement Plan. Defendants contend that in addition to the Plan and its provisions there were many other factors that motivated plaintiffs and other members of the Management Staff in continuing in the employ of the Penney Company. Among these were:

A. Liberal remuneration in the form of salary and profit-sharing compensation.

B. Unusual opportunity for advancement because of the growth of the Company, because of the principle of promotion from within the Company's ranks and because of the absence of family control.

C. Facilities and assistance provided by the Company to assist men in realizing their maximum possibilities.

D. Independence of action extended to managers in operating their stores.

E. Fair and equitable treatment of all associates irrespective of rank.

F. The financial soundness and stability of the Company, and the consequent freedom from financial worry about the business.

G. Benefits provided under the liberal Sick Benefit Plan, and the availability of Group Life and Disability Insurance, Automobile and other types of insurance at low rates.

H. Encouragement of store managers to participate actively in community affairs.

3.

Defendants deny plaintiffs' Contention of Fact No. 3. Defendants contend that all the benefits provided under the Plan, together with other factors including those set forth in defendants' Answer and Countercontention in paragraph 2 above, motivated managers of stores and other members of

the Management Staff in continuing in the employ of the Penney Company.

4.

Defendants deny plaintiffs' Contention of Fact No. 4.

5.

Defendants deny plaintiffs' Contention of Fact No. 5.

6.

Defendants deny plaintiffs' Contention of Fact No. 6.

7.

Defendants deny plaintiffs' Contention of Fact No. 7.

8.

Defendants deny plaintiffs' Contention of Fact No. 8.

9.

Defendants deny plaintiffs' Contention of Fact No. 9.

10.

Defendants deny plaintiffs' Contention of Fact No. 10.

11.

Defendants deny plaintiffs' Contention of Fact No. 11.

12.

Defendants deny plaintiffs' Contention of Fact No. 12.

13.

Defendants deny plaintiffs' Contention of Fact No. 13.

14.

Defendants deny plaintiffs' Contention of Fact No. 14.

15.

Defendants have no knowledge of what advice the plaintiffs received at any time from their present or other counsel or anyone else as to any alleged illegality respecting the Plan and Trust Agreement and for that reason deny plaintiffs' Contention of Fact No. 15.

Plaintiffs' Answers to Defendants' Countercontentions of Fact

1.

Plaintiffs deny defendants' Countercontention of Fact number 1.

2.

Plaintiffs admit that they and other members of the Penney Company continued in the employ of Penney Company for many years when there was no profit-sharing retirement plan, but contend that during the earlier years of such continuance in said employment there was an opportunity to become a partner in one of the Penney stores and that in the later years of such employment there were opportunities from time to time to purchase so-called "expansion stock" sold by the Penney Company. Plaintiffs deny the remainder of defendants' Countercontention of Fact number 2.

3.

Plaintiffs deny defendants' Countercontention of Fact number 3.

Defendants' Contentions of Fact

1.

Defendants contend that the Profit-Sharing Retirement Plan became effective as of January 1, 1940.

2.

Defendants contend that J. C. Penney Company, in making its contributions to the Fund under the Plan and in taking all other action complained of by the plaintiffs with respect to the Plan and Trust Agreement, relied upon the acceptance of the Plan and Trust Agreement by plaintiffs and other participants as evidenced by their execution of Participant's Acceptance Forms.

3.

Defendants contend that at no time prior to the commencement of this action did plaintiffs or either of them assert any claim that the Plan and Trust Agreement in so far as they related to the 200,000 shares of stock were void and invalid in any way.

4.

Defendants contend that with respect to the total amounts shown upon Exhibit 292 as being received by each participant whose participation ceased prior to July 1, 1945, or thereafter but prior to such participant's reaching age 60, as defined in

the Plan, such total amounts, of such participation ceased prior to March 1, 1948, were received by participants, or if not living, by their beneficiaries, in cash, if participation ceased on or after March 1, 1948 then such amounts were in the form of deferred installment refund annuities, surrenderable for cash, purchased under the Group Annuity Contracts, with rights in their beneficiaries if participation ceased because of death to receive such amounts under the Death Benefit provisions of the Group Annuity Contracts.

5.

If the relief sought by plaintiffs should be granted there may be distributed to some or all of the 1215 past participants whose participation in the Plan ceased prior to their reaching retirement status between January 1, 1940 and December 31, 1953, or to their estates, a very substantial number of shares of the Penney Company stock held by the Trustee. The number of shares in the hands of the Trustee which would otherwise be available for distribution to retiring participants would accordingly be reduced and present participants reaching retirement status would receive a smaller number of shares than they would otherwise have received under the formula provided in the Plan. In addition the dividend credits that would otherwise be available to purchase their annuities receivable upon retirement would be reduced as a result of the distribution of such shares of stock from the Trust Fund. Furthermore, the dividend credits that would otherwise form part of

the aggregate credits of present participants who cease participation in the Plan before reaching retirement status would likewise be reduced as a result of the distribution of such shares from the Trust Fund.

Plaintiffs' Answers to Defendants' Contentions of Fact

1.

Plaintiffs deny defendants' Contention of Fact number 1.

2.

Plaintiffs deny defendants' Contention of Fact number 2.

3.

Plaintiffs admit defendants' Contention of Fact number 3, except plaintiffs contend that defendants were advised prior to suit that claims would be asserted on behalf of the plaintiffs and those for whom they prosecute the action.

4.

Plaintiffs do not have information as to the Contention of Fact number 4 of defendants, and therefore deny the same.

5.

Plaintiffs deny defendants' Contention of Fact number 5.

Defendants' Answers to Plaintiffs' Countercontentions of Fact

Defendants deny plaintiffs' Countercontention of Fact set forth in plaintiffs' Answer to defendants' Contention of Fact number 3.

Plaintiffs' Contentions of Law

1.

Plaintiffs contend that plaintiffs and the other store managers and members of the management staff accepted the Plan by continuing in the employment of the Company.

2.

Plaintiffs contend that upon the acceptance of the Plan by continuing in employment the Plan became a contract.

3.

Plaintiffs contend that the employment contracts in force between Penney Company and its store managers when the Plan was issued did not require the store managers to continue in their employment.

4.

Plaintiffs contend that, after the sale of the 200,000 shares of J. C. Penney Company stock to the Trustee, J. C. Penney Company did not own, and did not have any beneficial interest in, such shares of stock.

5.

Plaintiffs contend that the trust purported to be created with respect to the 200,000 shares of stock was in effect a lottery, and against the public policy of the State of New York, and void.

6.

Plaintiffs contend that under the Plan the shares of stock were to be awarded, as a prize, to those of the participants who were so fortunate as to reach

retirement status and in so doing remain alive and avoid discharge without cause, and remain free from illness forcing voluntary retirement.

7.

Plaintiffs contend that the shares of those participants who died prior to reaching retirement status, or who were discharged, or who, on account of illness or other causes, voluntarily retired, remained in the Trust and were, or are to be, distributed to other participants who attained, or will attain, retirement status.

8.

Plaintiffs contend that the Plan and Trust Agreement constitute one instrument and are to be construed as a whole.

9.

Plaintiffs contend that the J. C. Penney Company and the Trustee are the only necessary parties defendant in this action.

10.

Plaintiffs contend that they are entitled to a decree adjudging and decreeing that the trust purported to be established with respect to the shares of stock of J. C. Penney Company is illegal and void and of no effect.

11.

Plaintiffs further contend that a decree should be entered herein adjudging and decreeing that the trustee holds the shares of stock of J. C. Penney Company under a resulting trust in favor of the plaintiffs and those for whom plaintiffs prosecute this action and all other participants who did not

attain retirement status in that proportion which the contributions and earnings of each such person bears to the total contributions and earnings of all such persons used in the acquisition of and payment for said shares of stock.

12.

Plaintiffs contend that they are entitled to a decree determining what proportion of the shares of J. C. Penney Company stock were acquired by the contributions and earnings of the plaintiffs and those for whom the present action is prosecuted by plaintiffs.

13.

Plaintiffs contend that plaintiffs are entitled to a decree awarding plaintiffs compensation for the reasonable value of the services of their attorneys in the prosecution of this action, and for their costs and disbursements incurred herein, and further decreeing that the sums so awarded shall constitute a lien upon all the shares of stock found by the court to have been acquired by the contributions and earnings of the plaintiffs and those for whom they prosecute this action.

Defendants' Answers and Countercontentions of
Law to Plaintiffs' Contentions of Law

1.

Defendants deny plaintiffs' Contention of Law No. 1. Defendants contend that the Plan, when originally distributed to eligible associates, was an offer by Penney Company to such persons, including

plaintiffs, which was accepted by each of them and became a contract when he signed and delivered to Penney Company his Participant's Acceptance Form. Defendants further contend that the Plan, as amended from time to time, has continued since its original distribution to be an offer by Penney Company to associates becoming eligible, such offer being accepted by them upon their signing and delivering to Penney Company their Participant's Acceptance Forms.

2.

Defendants deny plaintiffs' Contention of Law No. 2. Defendants here repeat the countercontentions made by them in their answer to plaintiffs' Contention of Law No. 1.

3.

Defendants admit plaintiffs' Contention of Law No. 3. Defendants, however, by way of supplementing said admission, contend that after the Plan became effective, neither employment contracts nor the Plan itself required or gave a right to managers to continue in their jobs.

4.

Defendants deny plaintiffs' Contention of Law No. 4. Defendants contend that Penney Company did not own and did not have any interest in the shares of stock purchased and held by the Trustee under the Agreement of Trust or in the dividends therefrom except defendants contend that Penney Company did have an interest in having the Plan and the assets of the Fund under the Plan, which

included the 200,000 shares of J. C. Penney Company stock purchased by the Trustee, properly administered.

5.

Defendants deny plaintiffs' Contention of Law No. 5.

6.

Defendants deny plaintiffs' Contention of Law No. 6.

7.

Defendants deny plaintiffs' Contention of Law No. 7.

8.

Defendants deny plaintiffs' Contention of Law No. 8 except defendants admit that the Plan and Trust Agreement shall be read as an entirety.

9.

Defendants deny plaintiffs' Contention of Law No. 9. Defendants contend that the interests of present participants under the Plan are such that said participants are indispensable parties to this action.

10.

Defendants deny plaintiffs' Contention of Law No. 10.

11.

Defendants deny plaintiffs' Contention of Law No. 11.

12.

Defendants deny plaintiffs' Contention of Law No. 12.

13.

Defendants deny plaintiffs' Contention of Law No. 13.

Plaintiffs' Answers to Defendants' Countercontentions of Law

1.

Plaintiffs deny defendants' Countercontention of Law number 1.

2.

Plaintiffs deny defendants' Countercontention of Law number 2.

3.

Plaintiffs admit defendants' Countercontention of Law number 3.

4.

Plaintiffs admit defendants' Countercontention of Law number 4.

5.

Plaintiffs deny defendants' Countercontention of Law number 9.

Defendants' Contentions of Law

1.

Defendants contend that the Plan and Trust Agreement with respect to the 200,000 shares of J. C. Penney Company stock are valid under the laws of the State of New York in all respects.

2.

Defendants contend that all funds received by the Trustee from Company contributions, participants'

contributions, dividends and earnings of the Fund, together with the 200,000 shares of J. C. Penney Company stock, became the property, not of the participants, but of the Trustee, subject only to the terms of the Plan and Trust Agreement.

3.

Defendants contend that all the funds and the 200,000 shares of stock referred to in defendants' Contention of Law No. 2 above were and have been held, applied or distributed in accordance with the terms of the Plan and Trust Agreement.

4.

Defendants contend that the plaintiffs and each of them are estopped to deny the validity of the Plan and Trust Agreement in so far as it applies to the 200,000 shares of J. C. Penney Company stock held by the Trustee for the following reasons:

(a) The plaintiffs signed Participant's Acceptance Forms agreeing to be bound by the terms of the Plan and Trust Agreement.

(b) The plaintiffs during their respective periods of participation in the Plan accepted the benefits provided under the Plan.

(c) From 1940 when the plaintiffs signed their Acceptance Forms until the commencement of this action neither of the plaintiffs made any claim that the Plan or Trust Agreement were invalid in any way.

(d) J. C. Penney Company, in making its contributions to the Plan and in taking all other action complained of by the plaintiffs with respect to the

Plan and Trust Agreement, relied upon the facts set forth in (a), (b) and (c) above.

5.

Defendants contend that plaintiffs Wells and Albertsen with notice of the terms and conditions of the Plan and Trust Agreement from at least the dates on which they signed their respective Participant's Acceptance Forms (being August 10, 1940 for Wells and September 18, 1940 for Albertsen) refrained from making any protests against such terms and conditions in so far as they related to the holding of the 200,000 shares of J. C. Penney Company stock for distribution only to participants reaching retirement status as defined in the Plan, and refrained from commencing this action until July 11, 1951, during all of which periods J. C. Penney Company made the contributions and took the other action called for by the Plan and Trust Agreement, and plaintiffs therefore have been guilty of such laches as should in equity bar them and each of them from maintaining this action.

6.

Defendants contend that plaintiffs Wells and Albertsen do not represent anyone other than themselves in this action.

7.

Defendants contend that this action is not properly maintainable as a class action.

If the Court should disagree with defendants'

Contentions of Law numbers 6 and 7 above, defendants make the Contentions of Law appearing in paragraphs 8 and 9 below.

8.

Defendants contend that all former participants are estopped to deny the validity of the Plan and Trust Agreement in so far as it applies to the 200,000 shares of J. C. Penney Company stock held by the Trustee for the following reasons:

(a) All former participants signed Participant's Acceptance Forms agreeing to be bound by the terms of the Plan and Trust Agreement.

(b) All former participants during their respective periods of participation in the Plan accepted the benefits provided under the Plan.

(c) From the respective dates when all former participants signed their Acceptance Forms until the commencement of this action no former participant made any claim that the Plan or Trust Agreement were invalid in any way.

(d) J. C. Penney Company, in making its contributions to the Plan and in taking all other action complained of in this action with respect to the Plan and Trust Agreement, relied upon the facts set forth in (a), (b) and (c) above.

9.

Defendants contend that all former participants with notice of the terms and conditions of the Plan and Trust Agreement from at least the dates on which they signed their respective Participant's Acceptance Forms refrained from making any protests

against such terms and conditions in so far as they related to the holding of the 200,000 shares of J. C. Penney Company stock for distribution only to participants reaching retirement status as defined in the Plan, and refrained from commencing any action until July 11, 1951, during all of which periods J. C. Penney Company made the contributions and took the other action called for by the Plan and Trust Agreement, and all former participants therefore have been guilty of such laches as should in equity bar them and each of them from maintaining this action.

Plaintiffs' Answers to Defendants' Contentions of Law

Plaintiffs deny each and every of defendants' Contentions of Law.

Key to Letters Used in Issues of Fact and Law:
PCF—Plaintiffs' Contentions of Fact.

DCCF—Defendants' Countercontentions of Fact.

PADCCF—Plaintiffs' Answers to Defendants' Countercontentions of Fact.

DCF—Defendants' Contentions of Fact.

PCL—Plaintiffs' Contentions of Law.

DCCL—Defendants' Countercontentions of Law.

PADCCL—Plaintiffs' Answers to Defendants' Countercontentions of Law.

DCL—Defendants' Contentions of Law.

Issues of Fact

A. Issues of Fact Based Upon Plaintiffs' Contentions of Fact, Defendants' Answers and Countercontentions of Fact Thereto, and Plaintiffs' Answers to Defendants' Countercontentions of Fact

1. (DCCF 1)

Was the Plan one among many other factors which motivated the managers and the other members of the management staff to continue in the employ of the Penney Company?

2. (PCF 2)

Did plaintiffs and the other managers and members of the management staff continue in the employment of the Penney Company in reliance upon the Plan and its provisions?

3. (DCCF 2, 3)

Were there many other factors, including those set forth in Defendants' Answer and Countercontention to Plaintiffs' Contention of Fact No. 2, which, in addition to the Plan and its provisions, motivated plaintiffs and the other members of the management staff in continuing in the employ of the Penney Company?

4. (PADCCF 2)

During the years prior to the Plan when plaintiffs and other members of the management staff continued in the employ of the Penney Company, were there in the earlier years of such period opportunities for them to become partners in Penney stores, and were there in the later years of such

period opportunities for them, from time to time, to purchase "expansion stock" which was sold by the Penney Company?

5. (PCF 3)

Was the opportunity to receive stock upon retirement the chief inducement for the managers and the other members of the management staff to remain in the employment of the Penney Company?

6. (PCF 4)

In purchasing the 200,000 shares of Penney Company stock was the Trustee acting for and on behalf of plaintiffs and all the other then participants?

7. (PCF 5)

Were the 200,000 shares of J. C. Penney Company stock acquired by the Trustee purchased by the Trustee with the funds and upon the financial responsibility of plaintiffs and the other then participants?

8. (PCF 6)

Were all the funds and moneys used to pay for the 200,000 shares of J. C. Penney Company stock the funds and moneys of plaintiffs and the other then participants?

9. (PCF 7)

Were all the funds borrowed by the Trustee from Continental Bank borrowed upon the security of assets and funds owned by plaintiffs and the other then participants?

10. (PCF 8)

Were all the sums used to repay the loan from Continental Bank, and the accrued interest thereon, the funds and moneys of plaintiffs and the other then participants?

11. (PCF 9)

(a) Did the death of a participant result in the forfeiture of the shares of stock to which such participant would have been entitled upon reaching retirement status?

(b) If the answer to (a) above is in the affirmative did the shares so forfeited remain in the Trust for distribution to other participants?

12. (PCF 10)

(a) Did the discharge of a participant result in the forfeiture of the shares of stock to which such participant would have been entitled upon reaching retirement status?

(b) If the answer to (a) above is in the affirmative, did the shares so forfeited remain in the Trust for distribution to other participants?

13. (PCF 11)

(a) Did the voluntary withdrawal of a participant for any reason result in the forfeiture of the shares of stock to which such participant would have been entitled upon reaching retirement status?

(b) If the answer to (a) above is in the affirmative, did the shares so forfeited remain in the Trust for distribution to other participants?

14. (PCF 13)

Were death, illness and discharge from the employment of the Penney Company hazards and chances which were assumed by each participant whose contributions and earnings, plaintiffs contend, were used in the acquisition of the shares of J. C. Penney Company stock?

15. (PCF 14)

If the Court should enter a decree awarding plaintiffs and others whom they contend they represent shares of stock of J. C. Penney Company, would 4% of the value of such shares be a reasonable amount to be allowed, if any allowance be made, for the services of plaintiffs' attorneys in this action?

B. Issues of Fact Based Upon Defendants' Contentions of Fact, and Plaintiffs' Answers and Countercontentions Thereto, and Defendants' Answers Thereto.

16. (DCF 1)

Did the Profit-Sharing Retirement Plan become effective as of January 1, 1940?

17. (DCF 4)

Did J. C. Penney Company, in making its contributions to the Fund under the Plan and in taking all other action with respect to the Plan and Trust Agreement, rely upon the acceptance of the Plan and Trust Agreement by plaintiffs and other participants as evidenced by their execution of Participant's Acceptance Forms?

18. (PADCF 5)

Were defendants prior to suit advised that claims would be asserted on behalf of the plaintiffs and others for whom they contend they prosecute this action?

19. (DCF 6)

Were the total amounts shown upon Ex. 292 as being received by each participant, or his beneficiary in case of death, received in cash if participation ceased prior to March 1, 1948, and, if participation ceased after such date, were the amounts in the form of deferred installment refund annuities, surrenderable for cash, purchased under the Group Annuity Contracts, with rights in beneficiaries if participation ceased because of death to receive such amounts under the Death Benefit provisions of the Group Annuity Contracts.

20. (PCF 15)

Were the plaintiffs at the inception of the Plan and at the time of becoming participants in the Plan and Trust and prior to two months immediately prior to the institution of the present suit advised of any illegality in any portion of the Trust Agreement?

Issues of Law

A. Issues of Law Based Upon Plaintiffs' Contentions of Law, Defendants' Answers and Countercontentions of Law Thereto, and Plaintiffs' Answers to Defendants' Countercontentions of Law

1. (PCL 1)

Did plaintiffs and the other store managers and members of the management staff accept the Plan by continuing in the employ of the Company?

2. (PCL 2)

Did the Plan become a contract upon being accepted by the participants continuing in the Company's employ?

3. (DCCL 1 & 2)

Was the Plan, when originally distributed to eligible associates, an offer by Penney Company to such persons, including plaintiffs, which was accepted by each of them and became a contract when each signed and delivered to Penney Company his Participant's Acceptance Form?

4. (DCCL 1 & 2)

Did the Plan, as amended from time to time, continue to be an offer by Penney Company to associates becoming eligible, which was accepted upon the signing and delivery to Penney Company of their Participant's Acceptance Forms?

5. (PCL 5)

Did Penney Company, after the sale of the 200,000 shares of J. C. Penney Company stock to the Trustee, own, or have any beneficial interest in, such shares of stock?

6. (PCL 6)

Was the trust purported to be created with respect to the 200,000 shares of stock a lottery, and

against the public policy of the State of New York, and void?

7. (PCL 8)

Under the Plan were the shares of stock to be awarded, as a prize, to those participants who were so fortunate as to reach retirement status and, in so doing, remain alive, avoid discharge without cause, and remain free from illness forcing voluntary withdrawal from the Plan?

Defendants do not agree with the foregoing statement of Issue of Law number 7. (PCL 8) and submit in lieu thereof the following Issue:

7A (PCL 8)

Under the Plan were shares of stock to be awarded as a prize to those participants who reached retirement status while still in the employ of the Company?

8. (PCL 9)

Under the Plan were the shares of those participants who died prior to reaching retirement status, or who were discharged prior to reaching retirement status, or who, on account of illness or other causes, voluntarily withdrew as participants prior to reaching retirement status, retained in the Trust and held for distribution to other participants upon their attaining retirement status?

Defendants do not agree with the foregoing statement of Issue of Law number 8. (PCL 9) and submit in lieu thereof the following Issue:

8A (PCL 9)

Did participants who died prior to reaching retirement status, or who were discharged, or who on account of illness or other causes voluntarily left the Company's employ before reaching retirement status, have shares of stock which remained in the trust and were or are to be distributed to other participants who attained or will attain retirement status?

9. (PCL 10)

Do the Plan and Trust Agreement constitute one instrument?

10. (PCL 10)

Are the Plan and Trust Agreement to be construed as a whole?

11. (PCL 12)

Are the J. C. Penney Company and the Trustee the only necessary parties defendant in this action?

12. (DCCL 12)

Are the interests of present participants under the Plan such that said participants are indispensable parties to this action?

13. (PCL 13)

Are plaintiffs entitled to a decree adjudging and decreeing that the trust purported to be established with respect to the shares of stock of J. C. Penney Company is illegal and void and of no effect?

14. (PCL 14)

Should a decree be entered adjudging and decreeing that the Trustee holds the shares of stock of J. C. Penney Company under a resulting trust in favor of plaintiffs and those for whom plaintiffs prosecute this action and all other participants who did not attain retirement status in that proportion which the contributions and earnings of each such person bears to the total contributions and earnings of all such persons used in the acquisition and payment for said shares of stock?

15. (PCL 15)

Are plaintiffs entitled to a decree determining what proportion of the shares of J. C. Penney Company stock was acquired by the contributions and earnings of plaintiffs and those for whom plaintiffs prosecute this action?

16. (PCL 16)

Are plaintiffs entitled to a decree awarding plaintiffs compensation for the reasonable value of the services of their attorneys in the prosecution of this action, and for their costs and disbursements incurred herein, and decreeing that the sums so awarded shall constitute a lien upon the shares of stock found by the court to have been acquired by the contributions and earnings of the plaintiffs and those for whom they prosecute this action?

B. Issues of Law Based Upon Defendants' Contentions of Law and Plaintiffs' Answers Thereto

17. (DCL 1)

Are the Plan and Trust Agreement with respect to the 200,000 shares of J. C. Penney Company stock valid in all respects under the laws of the State of New York?

18. (DCL 2)

Did all the funds received by the Trustee from Company contributions, participants' contributions, dividends and earnings of the Fund, together with the 200,000 shares of J. C. Penney Company stock, become the property not of the participants but of the Trustee, subject only to the terms of the Plan and Trust Agreement?

19. (DCL 3)

Are, and were, all the funds and the 200,000 shares of stock referred to in Issue of Law number 18. above held, applied or distributed in accordance with the terms of the Plan and Trust Agreement?

20. (DCL 4)

Are the plaintiffs, and each of them, estopped to deny the validity of the Plan and Trust Agreement in so far as it applies to the 200,000 shares of J. C. Penney Company stock held by the Trustee

(a) Because plaintiffs signed Participant's Acceptance Forms agreeing to be bound by the terms of the Plan and Trust Agreement?

(b) Because plaintiffs during their respective periods of participation accepted benefits provided under the Plan?

(c) Because, from 1940 when plaintiffs signed their Acceptance Forms until commencement of this action, plaintiffs did not make any claim that the Plan or Trust Agreement was invalid in any way?

(d) Because J. C. Penney Company, in making its contributions to the Plan and in taking all other action with respect to the Plan and Trust Agreement, relied upon facts set forth in (a), (b) and (c) above?

21. (DCL 5)

Are the plaintiffs guilty of such laches as should in equity bar them and each of them from maintaining this action because plaintiffs with notice of the terms and conditions of the Plan and Trust Agreement from at least the dates they signed their respective Participant's Acceptance Forms refrained from making any such protests against such terms and conditions in so far as they related to the holding of the 200,000 shares of J. C. Penney Company stock for distribution only to participants reaching retirement status as defined in the Plan and plaintiffs refrained from commencing this action until July 11, 1951, during all of which periods the Penney Company made the contributions and took the other action called for by the Plan and Trust Agreement.

22. (DCL 6)

Do plaintiffs Wells and Albertsen represent anyone other than themselves in this action?

23. (DCL 7)

Is this action properly maintainable as a class action?

If the Court should decide Issues of Law 22. and 23. above in the affirmative then the Court should consider and determine Issues of Law 24. and 25. below.

24. (DCL 8)

Are all former participants estopped to deny the validity of the Plan and Trust Agreement in so far as it applies to the 200,000 shares of stock of J. C. Penney Company held by the Trustee for the reasons set forth in (a), (b), (c) and (d) of number 20. above?

25. (DCL 9)

Are all former participants guilty of laches for the reasons set forth in Issue of Law number 21. above?

* * * * *

The parties hereto agree to the foregoing Pre-trial Order and the Court being fully advised in the premises,

Now Orders that this case shall proceed to trial before the Court without a jury; it is further

Ordered that the foregoing Pre-trial Order shall not be amended, except by consent of all parties or to prevent manifest injustice; it is further

Ordered that this Pre-trial Order supersedes all pleadings; it is further

Ordered that upon trial of this cause, no proof shall be required as to matters of fact hereinabove found to be admitted, but that proof upon the Issues

of Fact between plaintiffs and defendants as hereinabove stated shall be had.

Dated at Portland, Oregon, this 22nd day of June, 1954.

/s/ GUS J. SOLOMON,
District Judge

Approved:

/s/ RALPH H. KING,
Of Attorneys for Plaintiffs

/s/ CLARENCE J. YOUNG,
Of Attorneys for Defendants

[Endorsed]: Filed June 22, 1954.

[Title of District Court and Cause.]

OPINION

December 29, 1955

Solomon, Judge:

The stock distribution provisions of the Penney Company Retirement Plan are valid and legal. They do not involve a lottery or other illegal scheme.

The stock provisions are an integral part of the Plan, but whether such provisions are considered separately or in connection with other portions of the Plan does not alter my opinion that the distribution of stock to only those persons who reach retirement age and otherwise qualify under the Plan, is a valid and legal arrangement.

The Plan and the amendments made thereto were

submitted to the Commissioner of Internal Revenue, and by him found to qualify as an employees' trust under §§165 and 165(a) of the Internal Revenue Code. By reason thereof, contributions made by the company are deductible in computing its income subject to federal income tax, and the income from the trust is exempt from such taxes. In my opinion, the contention that the stock provisions of the Plan conflict with federal tax law is without merit.

The prohibition against lotteries, bookmaking, and gambling in the New York Constitution and the New York Statutes defining a lottery were never designed to nor do they cover a situation of this kind in which stock is distributed to employees who qualify under retirement or pension plans.

This particular Plan is both generous and sound. The fact that older employees, among them some members of the company's Board of Directors, who were among the first to qualify for retirement with stock, received a slightly greater number of shares than younger and future employees will receive when they retire, does not render the Plan unfair, discriminatory, fraudulent or illegal. Neither is it a proper basis for attacking the integrity of the executive officers and members of the Board of the company who were responsible for the Plan. There is a sound and rational basis for permitting employees who have not built up large credits for themselves under other provisions of the Plan to receive an advantage in connection with the distribution of stock.

In 1940, the company sold 200,000 shares of its un-

issued stock to the trust set up in connection with the Plan for \$5,700,000 (later adjusted to \$6,000,000). This was approximately \$10,000,000 less than its market value. Since that time, the company has contributed, on an annual basis, an amount equal to 2% of the prior year's aggregate regular salaries of all participants, in accordance with §6(a) of the Plan, and 6% of the company's net profit in excess of 15% of the common stock book value of the company, in accordance with §6(b) of the Plan.

On December 31, 1953, the remaining Penney stock held by the trustee had a market value of over \$36,000,000. The other assets held in connection with the Plan exceeded \$63,000,000. The total direct contributions to such assets by the participants amounted to less than \$36,000,000.

In one sense, all of the company's contributions can be characterized as being part of the compensation paid to participants. But that does not mean that the participants were entitled to receive such contributions or the benefits thereof in a manner other than that specified in the Plan itself. Nor does it mean that the loan with which the stock was purchased was repaid solely from funds contributed by the participants.

All of the participants signed acceptance forms, agreeing to be bound by the terms of the Plan and Trust Agreement. Plaintiffs, as well as all former participants in the Plan who did not achieve retirement status, have accepted benefits which have included large contributions by the company. The company made its original contribution and its subse-

quent contributions on the basis of such acceptances and the validity of the Plan.

I have already found that the Plan is valid, but even if by some technical construction the Plan was found to constitute a lottery, it would be highly inequitable to permit plaintiffs to recover either on their own behalf or on behalf of the class for which they are suing.

This opinion assumes and I find that this action is properly maintainable as a class action in this court.

Counsel for defendants shall prepare findings of fact, conclusions of law, and a judgment in favor of the defendants, all in accordance with this opinion.

[Endorsed]: Filed Dec. 29, 1955.

[Title of District Court and Cause.]

ORDER OF SUBSTITUTION

This cause came on for hearing on February 27th, 1956, on motion of The Chase Manhattan Bank, a New York corporation, successor by merger to The Chase National Bank of the City of New York, for an order substituting it in place of The Chase National Bank of the City of New York as a defendant, and, thereupon, upon consideration thereof, it is

Ordered that The Chase Manhattan Bank be and it hereby is substituted as a party defendant herein in place of The Chase National Bank of the City of New York, that the title of the action be amended accordingly, and that the action be continued with-

out prejudice to any proceedings already had herein.

Dated at Portland, Oregon, this 27th day of February, 1956.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed March 8, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following approval and entry of record of the Pre-Trial Order herein, the above entitled cause came on regularly for trial on the 23rd day of June, 1954, before the Honorable Gus J. Solomon, undersigned Judge of the above entitled Court, sitting without a jury. Plaintiffs appeared in person, and by and through Ralph H. King, Frederick Yerke, Jr., and Paul R. Meyer (King, Miller, Anderson, Nash & Yerke), of their attorneys. Defendant, J. C. Penney Company, a corporation appeared by and through Clarence J. Young and Wayne Hilliard (Koerner, Young, McColloch & Dezendorf), W. H. Dannat Pell, Henry Stone and C. Robert Roll (Pell, Butler, Curtis & LeViness), of its attorneys. Defendant, The Chase National Bank of the City of New York, a national banking association, a predecessor in interest to defendant The Chase Manhattan Bank, a corporation, appeared by and through Clarence J. Young and Wayne Hilliard (Koerner, Young, Mc-

Colloch & Dezendorf), of attorneys for said defendant, who now appear for The Chase Manhattan Bank.

Thereupon evidence on their case in chief was introduced on behalf of plaintiffs followed by the introduction of answering evidence on behalf of defendants. All of the parties having rested, the attorneys for the respective parties were directed to prepare and submit briefs to the Court.

Thereafter the case was taken under advisement and the Court, having heard the evidence at the time of trial and having read the Pre-trial Order, which superseded all pleadings, and all of the testimony, exhibits and briefs, and being fully advised, did, on the 29th day of December, 1955, render and file with the Clerk of this Court its opinion in favor of defendants. Subsequent to December 29, 1955 the Court entered an order herein substituting The Chase Manhattan Bank as a defendant in place of The Chase National Bank of the City of New York.

The Court now makes and enters the following:

Findings of Fact

1.

Plaintiff, Harvey L. Wells is, and at the time of instituting this action was, a citizen of the United States and a citizen and resident of the State of Oregon.

2.

Plaintiff, Harry J. Albertsen is, and at the time of instituting this action was, a citizen of the United

States and a citizen and resident of the State of California.

3.

Defendant, J. C. Penney Company (sometimes hereinafter referred to as "Penney Company or the Company") is, and at all times since 1924 has been, a corporation organized and existing under the laws of the State of Delaware.

4.

At the commencement of the action The Chase National Bank of the City of New York (hereinafter referred to as "The Chase Bank"), a national banking association organized and existing under the laws of the United States of America, was named as a defendant. As of April 1, 1955, it was merged into President and Directors of the Manhattan Company (Bank of the Manhattan Company), a corporation organized and existing under the laws of the State of New York, the name of which was changed to The Chase Manhattan Bank. Its principal place of business has at all times been in the City and State of New York.

5.

The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

6.

The business of the Penney Company consists and has consisted of the distribution at retail of wearing apparel for men, women and children, and of dry goods and home furnishings at low and medium prices through a chain of stores situated throughout

the United States. At the end of 1948, the last year plaintiff Wells was employed by the Penney Company, it had 1,601 stores located in small, medium and large size communities in the 48 states, each store being managed by one associate. At the end of 1950 the last full calendar year plaintiff Albertsen was employed by the Penney Company, it had 1,612 stores. At the end of 1953 the Penney Company had a total of 1,634 stores located in the 48 states, of which 42 stores were located in the State of Oregon.

7.

During the years 1937, 1938 and 1939 officials of the Penney Company made a study of retirement plans of various enterprises throughout the United States with the objective of developing a retirement plan which might be suitable to meet the needs of the Penney Company. Following such study and discussions in connection therewith the Comptroller of the Penney Company on or about November 24, 1939 submitted to the members of the Board of Directors of the Company a communication and attachments with reference to the establishment of a profit-sharing retirement plan for store managers and central and branch office executives of the Company. Said documents included a survey of such proposed plan, the plan in detail, explanatory material and exhibits.

8.

At a meeting held on December 5 and 6, 1939 the Board of Directors of the Penney Company, after consideration, adopted by unanimous vote of the full

Board, subject to approval by the stockholders and to its completion in final form, the Profit-Sharing Retirement Plan (for Management Staff) which, as amended from time to time, is before the Court in this action and is hereinafter referred to as the "Retirement Plan" or "the Plan."

9.

The term "compensation" as used in the Plan and as used herein means either the amount received by an employee of the Penney Company under contract as a portion of the profits of the store managed by him, or the amount received by a central or branch office employee as his share of the General Office Compensation Fund which is based on Company profits, and excludes regular salary.

10.

The term "participant" as used in the Plan and as used herein means a store manager or central or branch office employee having a contract entitling him to receive compensation, as defined in Finding of Fact 9 above, including store managers, buyers, employees holding positions of responsibility in the central and branch offices of Penney Company and executives, including those who are directors but excluding those who serve as directors only. It also includes employees holding positions of responsibility in any wholly-owned subsidiary determined by the Administrative Committee to be eligible. The Plan requires participation by all eligible employees.

11.

On December 26, 1939 the Company caused to be mailed to store managers, including plaintiffs, and central and branch office executives a letter of E. C. Sams, then President of the Company, as follows:

“President’s Office

New York, N. Y.

December 26, 1939.

“To the Managers and Central Office Executives:

“As you all know, it has been the unwritten policy of our company occasionally, when circumstances seemed to warrant it, to issue shares of its common stock to eligible executives and store managers. The number of shares, the price, and the time of issuance, depended in a general way on the development of the company. The purpose of that policy was to create incentive through ownership participation in the profits of the company and, also, to assist participants in building for themselves and their families a security against advanced age and often its incidental dependency. It is questioned by the company’s Board whether that policy in recent years has met the purposes intended.

“The Board feels strongly however, that the advisability of attaining the purposes mentioned still exists. It recognizes that ownership participation has played a part in the development of our company. It also believes that distinct benefit will be gained to associates and to the company by assisting associates in building a security against old age de-

pendence. This is being widely recognized in all competitive fields because of the growing need for making room on management staffs for younger associates who may contribute quicker recognition and faster development of new and modern merchandising techniques.

“Accordingly, a profit-sharing and retirement plan has been devised after much thought and study, which it is believed in large measure will in time meet the situation. This plan has been considered and approved by the Board of Directors. The adoption of the plan, however, is strictly subject to the stockholders’ approval, which cannot be obtained before the next annual meeting, March 21, 1940.

“If the plan is adopted, it will become operative as at January 1, 1940. The plan provides, among other things, for withholding a 20% portion of compensation due to all managers and central and branch office executives in any year. This will become part of the manager’s and executive’s savings under the plan. The company will also make certain contributions to the fund set up under the terms of the plan. While the plan does not require withholding of compensation until earnings for 1940 are due, which would ordinarily be paid early in 1941, it will permit deposits up to one-third of 1939, compensation payable early in 1940. In those cases where one-third of compensation is less than \$500.00, deposit privilege will be extended permitting deposit from compensation to \$500.00. In other words, managers may voluntarily deposit from their 1939 compensa-

tion, but there will be no compulsion as to any deposit until the 1940 compensation is paid, early in 1941.

“The plan, if adopted, will not cover any associates other than store managers with contracts and general office associates included in the General Office Compensation Fund. Therefore, men approved as ‘ready-to-manage’, and participants in ‘large’ store pools, will not be included under this Plan.

“This makes it necessary to revise all managers’ contracts as of December 31, 1939. You will be advised about your 1940 contract just as soon as possible after the stockholders’ decision is known. This brief information about the new plan, coming to you now, will permit you to arrange your personal affairs, taking into consideration the possible adoption of the plan and subsequent reduction in your immediate cash income from compensation. Furthermore, we feel sure that when you finally have an opportunity to go over the details of the plan you will recognize that its liberality will make it highly profitable for you to voluntarily deposit a portion of your compensation for 1939.

“Full information regarding the details of the plan will be made available to you when all legal points as to its adoption can be worked out.

“I am indeed happy to be able to advise you of this step. For years we have been seeking a better and more constructive way by which the managers and executives of today and tomorrow might share in the development of this company. Now, after a

year of intensive study, a plan has been developed that appears not only sound from the viewpoint of the stockholder but exceedingly attractive to every man in the management group. I am so enthusiastic about the new plan that it seems to me 1939 will take its place as one of the greatest years in our company's history. In my judgment, through the adoption of the 'Thrift' plan for associates outside the management group, and through the development of this plan for managers and executives, we have added new strength to the Penney Company and paved the way for even greater progress in the years ahead.

Sincerely,
E. C. Sams"

12.

On or about February 29, 1940, there was mailed to each stockholder of the Penney Company, including the plaintiffs, a document consisting of a letter of E. C. Sams, then President of the Company, a notice of the annual meeting of stockholders to be held on March 21, 1940 and a proxy statement containing a summary of the Retirement Plan. The purpose of the meeting was to elect directors and to consider and vote upon the approval and adoption of the Retirement Plan. In his letter Mr. Sams strongly recommended adoption of the Plan, and stated that five directors, including J. C. Penney and himself, would not be participants, but as stockholders were vitally interested in the success of the Company and enthusiastically in favor of the Plan.

13.

At the annual meeting of the stockholders held on March 21, 1940, the stockholders adopted a resolution approving and adopting the Plan effective as of January 1, 1940. Out of a total of 2,543,984 outstanding shares of Penney Company stock listed on the New York Stock Exchange, 1,660,558 shares were represented at the meeting and 1,598,246 shares were voted for the resolution, 60,561 shares being voted against. The Plan has been continuously in effect since its adoption. Shares of stock owned by plaintiff Wells were by his authority voted for such approval and adoption; shares owned by plaintiff Albertsen were not voted.

14.

In the proxy statement for the annual meeting of the stockholders on March 21, 1940, it was stated that upon their approval and adoption of the proposed Plan it was the intention of the Board of Directors to adopt for the salaried employees of the Company the retirement policy set forth in the proxy statement and such retirement policy was adopted by the Board of Directors by resolution on April 23, 1940, and was included as part of the Plan. The policy as so adopted fixed 60 years as the age for compulsory retirement, commencing January 1, 1945, with the first such retirement to take place on July 1, 1945 for those who in that year were 60 years of age or over, and with subsequent retirements to take place on July 1 of each succeeding year.

15.

In the form in which the Plan was adopted by the stockholders a participant was permitted to contribute up to $33\frac{1}{3}\%$ of his compensation for 1939 and was required to contribute 20% of his compensation for each year beginning with 1940 and was permitted to contribute up to $33\frac{1}{3}\%$. On May 28, 1940, the Board of Directors adopted a resolution amending the Plan so that the required contribution for each year beginning with 1940 was $33\frac{1}{3}\%$ of compensation.

16.

On July 8, 1940 the Board of Directors adopted a resolution approving the Plan in final form and approving and authorizing the execution of the Agreement of Trust to be entered into with the Chase Bank as Trustee of the Plan. The Trust Agreement was entered into between the Penney Company and Chase Bank as Trustee on the same day. At all times herein concerned, the trust property which is the subject of this action and the place of administration of the Trust and of the Plan have been and are now located in the City, County and State of New York.

17.

On August 1, 1940 in accordance with the provisions of the Plan and Trust Agreement Penney Company sold to the Chase Bank as Trustee of the Retirement Plan 200,000 shares of its authorized and unissued stock for \$5,700,000, later adjusted to \$6,000,000, the price per share being \$30, which was the approximate per share book value of the Com-

pany's outstanding stock on January 1, 1940. Such shares were to be and were held by the Trustee under the terms of the Plan.

18.

The Plan and Trust Agreement authorized the Trustee to borrow \$5,700,000 from the Continental Illinois National Bank & Trust Company of Chicago (hereinafter referred to as the Continental Bank) to provide funds with which to pay Penney Company for the 200,000 shares of stock and to pledge as security for the loan all the shares of stock, together with all other assets of the Fund. The Plan and Trust Agreement provided that all dividends on such shares of stock and all contributions received from the Company or from participants except a sum not to exceed \$150,000, should be paid to Continental Bank as received on account of the principal and interest of the loan.

19.

Pursuant to the Plan and Trust Agreement a Loan Agreement was entered into between Continental Bank, the Trustee, and the Company on July 25, 1940 providing that the Continental Bank would loan to the Trustee \$5,700,000. The loan was actually made on August 1, 1940, the Trustee delivering to Continental Bank the Trustee's note payable on or before three years from its date with interest at $11\frac{1}{2}\%$ per annum. The note provided in part as follows:

"To secure the payment of this note and of any

and all other liabilities of the undersigned to the holder hereof, howsoever created, arising or evidenced or acquired by said holder, whether direct or contingent, whether now or hereafter existing and whether accrued or to become accrued, the undersigned has pledged, transferred, and delivered to said Bank the following property, viz.:

200,000 shares of Common Stock of J. C. Penney Company, a Delaware corporation,

and, as additional security for the payment of this note and said other liabilities, the undersigned hereby pledges, assigns and transfers to the holder hereof all moneys, which are heretofore or hereafter received by the undersigned and which are, by the terms of said Agreement of Trust, provided generally or specifically to be paid to the Bank or the holder hereof, or to be applied on any indebtedness of the Trustee thereunder to the Bank or the holder hereof, and all such moneys paid to the holder by the undersigned shall be applied first to the payment of any matured and unpaid interest hereon and any balance shall be applied against the principal of this note whether or not then due."

20.

Under the terms of the Loan Agreement, the Penney Company agreed to continue to make the 2% of salary contribution and the 6% of the excess profits contribution required to be made by it under Article 6(a) and 6(b) of the Plan, and not to reduce the amount of these contributions, so long as any part

of the note delivered by the Trustee to the Continental Bank remained unpaid.

21.

The Plan, the Trust Agreement, the Loan Agreement and Note contained provisions to insure that the use by the Trustee of the moneys received by it to repay the loan would not interfere (and in fact it did not interfere) with the Trustee's ability to make whatever payments might be required in accordance with the credits to the various accounts under the Plan to participants who might leave the employ of the Company in the early years of the Plan. Those provisions were as follows:

(1) The Trustee was authorized by the Trust Agreement, Article Fourth E, and the Note that it delivered to the Continental Bank to retain, out of the cash received by it, \$150,000 for working funds.

(2) The Loan Agreement, paragraph 2, provided that the Bank at any time after the principal of the loan had been reduced to \$4,500,000 or less would make a new loan to the Trustee up to \$500,000 and would also release to the Trustee up to 10,000 shares of Penney Company stock.

(3) Under the terms of the Plan, Article 5, and Trust Agreement, Article Fourth B, Eighth A, the Trustee was authorized to reborrow from the Continental Bank, after any partial repayment of the original loan, up to \$5,700,000 (including any unpaid balance of the original loan) and, after complete repayment of any loans from the Continental Bank, to borrow without restriction on the security of the as-

sets in the Fund such amounts as might be required to carry out the purposes of the trust.

The Trustee paid the loan down to \$4,200,000 on the day that the loan was made. It did not at any time become necessary for the Trustee to borrow additional funds from the Continental Bank or from any other source. Both prior and subsequent to the repayment of the loan, the provisions set forth above constituted a resource of the Fund available to the Trustee to obtain additional moneys if any had been necessary to pay the credits of participants withdrawing from the Plan.

22.

Based on the price of Penney Company stock on the New York Stock Exchange on August 1, 1940, the 200,000 shares of Penney Company stock sold by the Penney Company to the Trustee had a value of \$16,000,000; between that date and December 29, 1941, the date when the loan was fully repaid, the value ranged between \$14,600,000 and \$18,400,000; between August 1, 1940, and December 31, 1953, the value of the shares held in the Trust was never lower than \$11,400,000. On December 31, 1953, the remaining Penney Company stock held by the Trustee had a market value of over \$36,000,000.

23.

The Trustee repaid the loan from the Continental Bank in full by December 29, 1941, interest having amounted to \$38,980.21. To do so, it used, in accordance with the provisions of the Plan and Trust Agreement, moneys received from contributions by

participants as well as the moneys from the Company's contributions measured by salary and profits and the dividends received on the Penney Company stock held by the Trustee.

24.

The use of the Fund's assets to pay the loan, including interest and expenses, did not interfere with making credits to the accounts provided for by the Plan in accordance with the terms thereof. At all times from August 1, 1940, through December 31, 1953, the resources of the Trust were sufficient to satisfy the credits of all participants.

25.

All monies used to pay the loan with which the stock was purchased came into the hands of the Trustee to be used solely in accordance with the Plan and Trust Agreement and retained no separate identity except as assets of the Fund.

26.

On July 25, 1940, the Comptroller of the Penney Company mailed to each store manager, including plaintiffs, and to eligible central and branch office executives a letter enclosing therewith a booklet which included a copy of the Plan and Trust Agreement, together with a Participant's Acceptance Form. Recipients of the letter were therein advised that they were expected to understand the Plan thoroughly and were urged to study the booklet carefully. They were also advised that if any phases of

the Plan were not clear after study, they should present questions to the writer of the letter.

27.

Plaintiff Wells and Plaintiff Albertsen, as store managers, each received one of the letters referred to in Finding of Fact 26 above, together with the booklet and the Participant's Acceptance Form. Each of the plaintiffs signed and returned to Penney Company his executed Acceptance Form. All eligible members of the Management Staff of Penney Company who thereafter became participants in the Plan also executed and returned to the Penney Company such Participant's Acceptance Form. Each participant who executed the Acceptance Form stated therein that he had read and understood the terms of the Plan and the Trust Agreement, was satisfied with their terms and conditions, and agreed to be bound by them. Plaintiff Wells' participation in the Plan continued from its inception until his resignation from the Penney Company on August 31, 1948. Plaintiff Albertsen's participation in the Plan continued from its inception until his discharge from the Penney Company on December 31, 1950.

28.

The Plan was intended to be and is a continuing Plan. The original Plan participants did not constitute a fixed class but Plan participants constitute an open-end class into which new participants enter to take the place of participants who retire or who leave the employ of the Company before attaining

retirement status. New participants also enter the Plan as the operations of the Penney Company expand and the number of stores increases. There is a constant flow of participants into and out of the Plan. In 1940 when the Plan was established there were 1,716 participants. At the end of the year 1953, there were 1,955 participants. The number of new participants entering the Plan from 1940 to 1953 was 1,454 as against 1,215 leaving the Company on retirement or earlier separation. Of the 1215 leaving the Company on retirement or earlier separation, 272 retired with stock, 102 died prior to reaching retirement status and without receiving stock, and 841 left the Plan for other reasons without receiving stock.

29.

On or about November 12, 1940 the United States Treasury Department issued a ruling that the Retirement Plan met the requirements of Section 165 of the Internal Revenue Code and therefore qualified as an employees' trust entitled to exemption from Federal income taxes. Subsequent to the amendment of Section 165 by the Revenue Act of 1942, the Treasury Department on or about December 21, 1944, issued a ruling that the Plan met the requirement of Section 165(a) of the Internal Revenue Code as amended and therefore qualified as an employees' trust entitled to exemption from Federal income taxes. The Treasury Department has also determined that amendments to the Plan submitted to it from time to time do not affect the Plan's continued qualification as an employees' trust entitled to

exemption from Federal income taxes under the applicable provisions of Section 165 of the Internal Revenue Code, and the Plan has so qualified at all times since its adoption.

30.

Pursuant to the provisions of the Retirement Plan the following action was taken for the years 1940 through 1953 inclusive:

A. From their profit-sharing compensation earned in 1939 and paid in 1940, 1,130 participants made voluntary contributions (being up to $33\frac{1}{3}\%$ of the 1939 compensation of each) in the total amount of \$1,666,827.89, of which amount \$1,575,000 was paid to the Trustee on August 1, 1940, and the remainder of \$91,827.89 was paid to the Trustee on September 26, 1940.

B. Each participant out of profit-sharing compensation earned in the years 1940 and 1941 contributed to the Fund under the Plan $33\frac{1}{3}\%$ of such annual compensation. Pursuant to the action taken by the Board of Directors in amending this Article because of increased **Federal Personal Income Taxes**, the percentage of each participant's contribution for subsequent years was reduced to 20% of his annual profit-sharing compensation.

C. After the close of the calendar year 1940 and of each calendar year thereafter, the Penney Company contributed annually to the Fund under the Plan:

1. An amount equal to 2% of the prior year's

aggregate regular salary paid to all employees receiving compensation as defined in the Plan for all or any part of the respective year, pursuant to Article 6(a) of the Plan.

2. For each of the years 1940 through 1949, an amount equal to 6% of its consolidated net profits for the calendar year in excess of 15% of its common stock book value as at the beginning of such calendar year, pursuant to Article 6(b) of the Plan. However, pursuant to the action of the Board of Directors taken because of the increased Federal taxes applicable to corporate profits for the years 1940 through 1945, in computing the contribution for these years called for by Article 6(b) there was charged against the consolidated net profits of the Company a lower amount for Federal taxes than the amount actually payable. For the years 1946 to 1949, pursuant to an amendment adopted by the Board of Directors restoring subdivision (b) of Article 6 to its original form effective January 1, 1946, the Company's 6% contribution was computed and made as originally provided in Article 6(b).

3. For each of the years 1950 through 1953, pursuant to an amendment to the Plan approved by the stockholders at a special Stockholders' Meeting held on December 27, 1950, an amount equal to 2% of the profits of the Company and its wholly owned subsidiaries for such calendar year available to its common stock as shown by the books of the Company before deduction of provision for Federal taxes based on the profits of the Company and its subsidiaries, and

the amounts required to be contributed by the Company for such year under the terms of its Thrift and Profit-Sharing Retirement Fund Plan and under the terms of this Plan.

31.

A. The annual contributions of each participant were credited to his separate account upon records maintained by the Administrative Committee of the Plan.

B. The Company's annual contributions measured by profits under Article 6(b) of the Plan were placed in an excess profits account for credit to accounts of participants upon their retirement or other separation from the Company.

C. The 200,000 shares of Penney Company common stock were separated in the Fund's account into two blocks, one of 50,000 shares and one of 150,000 shares, with actual cost applied to each block and such cost to be covered as set forth in subparagraphs D and E below. None of the 200,000 shares of stock were allocated or credited to the account of any participant but all such shares were held by the Trustee for distribution without cost to participants reaching retirement status. The method of determining the number of shares a retiring participant receives is set forth in Article 10 of the Plan as follows:

"(b) 1. * * * the retiring participant will receive without cost, from the 50,000 share block of J. C. Penney Company common stock, that number of shares (but never in excess of 1,000 shares) rep-

resented by the proportion of 150,000 shares that the participant's total contributions at the time of his or her retirement bear to the aggregate of such contributions of all participants in the Fund at such time—except that at any time that any cost determined as applying to the 50,000 share block is not covered by credits, the participant, in order to receive any shares, must pay the Trustee or have deducted from the amount available for the purchase of his annuity, the net debit cost at the time of retirement of the shares to which he or she is entitled.

“2. When the 50,000 share block of stock is exhausted, distribution on retirement shall be from the 150,000 share block, based on the proportion of the remaining shares that the retiring participant's total contributions at the time of his or her retirement bear to the aggregate contributions of all participants at such time. In such event, the stock shall be delivered to the retiring participant without charge and there shall be charged against the Reserve for Retirement account the uncovered cost of the stock delivered to any retiring participant as represented by the stock account of the Fund. The number of shares to be distributed to any participant shall be limited to 1,000.”

In January, 1946, the common stock of the Company was split three-for-one and the 50,000 share block, after distribution of 7,163 to participants retiring in 1945, became 128,511 shares and the 150,000 share block became 450,000, the maximum number of shares distributable to a retiring participant becoming 3,000. To December 31, 1953, all distributions

of stock to retiring participants were made from the original 50,000 share block.

D. The Company's contributions measured by salary under Article 6(a) of the Plan were credited to the \$1,500,000 cost of the 50,000 share block until that cost was entirely covered in September, 1941, by this contribution for 1940 amounting to \$102,-206.97 and dividend credits of \$1,397,793.03. Thereafter such contributions were credited to the Reserve for Retirement Account for the purpose of covering the \$4,500,000 cost of the 150,000 share block. On December 31, 1953 there was in the Reserve for Retirement Account the sum of \$2,149,-996.23 and the balance of uncovered cost to be covered by future annual Company contributions measured by salary under Article 6(a) was \$2,350,003.77.

E. After payment therefrom of interest on the money borrowed to purchase the stock and incidental Plan expenses not borne by the Company, dividends received by the Trustee on the 200,000 shares of stock (including the dividend credit of \$300,000 representing the equivalent of dividends of \$1.50 per share paid by the Company on its outstanding common stock in 1940 prior to the date the Trustee purchased the stock, being the adjustment provided for in Article 5 of the Plan) were applied to cover the cost of the 50,000 share block of stock, which was covered in September, 1941. Dividends received by the Trustee thereafter were credited to the Dividend Account. On August 8, 1945, the Trustee paid the Company \$300,000, the amount of the adjustment referred to above, as an addition to the purchase

price of the stock which payment was charged against the Dividend Account. Participants' accounts were credited with their proportionate share of the net balance in the Dividend Account upon their retirement or other separation from the Plan.

32.

Upon separation from the Plan, whether for retirement or otherwise, the total credits to the account of each participant consisted of:

- (a) all of his own contributions;
- (b) his share of the Company's contributions measured by profits;
- (c) his share of the Dividend Account;
- (d) his share of the net earnings of the Fund; and
- (e) commencing with July 1, 1949, his share of the insurance companies' rate credits (dividends) paid under the Group Annuity Contracts effective March 1, 1948.

33.

The Plan provided that a participant reaching retirement status would receive a paid-up non-assignable annuity purchased with his total Plan credits on the date of his retirement, together with the number of shares of Penney Company stock to which he was entitled under the formula provided in the Plan. Retirement for a participant was to be effective on July 1st of the year in which he reached retirement status.

34.

The Plan provided that a participant leaving the Plan for any reason prior to reaching retirement

status, or in the case of death, his beneficiary, would receive in cash his total Plan credits as of the date of his separation. After March 1, 1948, such a participant received such credits in the form of deferred annuities surrenderable for cash with rights in his beneficiary if participation ceased because of death to receive such amounts under the death benefit provisions of the Group Annuity Contracts held by the Trustee. No participant leaving the Plan for any reason (including death) before reaching retirement status was entitled to receive any of the shares of stock held by the Trustee for distribution to retiring participants.

35.

During the period 1940 to 1953, both inclusive, the total receipts of the Trust Fund under the Plan were \$93,478,047.51, comprised of the following items:

Dividends on Penney Company	
stock held by the Trustee.....	\$18,767,057.95
Company contributions under	
Article 6(a)	2,252,203.20
Company contributions under	
Article 6(b)	17,986,969.84
Participants' contributions	50,170,113.52
Fund Earnings	1,015,799.08
Rate Credits (dividends) from in-	
surance companies (after 1948)	3,285,903.92

36.

During the period 1940 to 1953, both inclusive, credits withdrawn by participants ceasing participa-

tion before reaching retirement status aggregated \$13,169,736.56, comprised of the following items:

Dividends on Penney Company	
stock held by the Trustee.....	\$2,316,228.13
Company contributions under Ar-	
ticle 6(b)	2,477,527.66
Participants' contributions	7,850,563.22
Fund Earnings	206,889.92
Rate Credits (dividends) from in-	
surance companies (after 1948)	318,527.63

37.

During the period 1940 to 1953, both inclusive, credits withdrawn by participants who reached retirement status aggregated \$10,981,476.76 comprised of the following items:

Dividends on Penney Company	
stock held by the Trustee.....	\$2,124,514.64
Company contributions under Ar-	
ticle 6(b)	2,054,182.49
Participants' contributions	6,357,747.93
Fund Earnings	190,600.93
Rate Credits (dividends) from in-	
surance companies (after 1948)	254,430.77

38.

In accordance with the provisions of the Plan, the Company's annual contributions measured by salaries under Article 6(a), totaling \$2,252,203.20 from 1940 to 1953, have been used for the purpose of covering the cost of the 200,000 shares of stock, as ex-

plained in Finding of Fact 31, subparagraph D, and no part of such contributions was credited to participants' accounts or withdrawn by participants.

39.

On December 31, 1953, participants' total credits under the Plan amounted to \$65,636,598.36, covered to the extent of \$63,286,594.59 by Fund assets consisting of cash on hand and receivable, Government bonds and deferred annuities issued by four insurance companies. The total direct contributions to such assets by the participants amounted to \$35,961,802.37. The difference of \$2,350,003.77 between participants' total credits and the foregoing Fund assets represented the remaining uncovered cost on the books of the Fund of the original 150,000 share block of stock, to be covered by the Company's annual 2% of salary contribution under Article 6(a). In addition to the foregoing assets the Trustee held on December 31, 1953 for distribution to retiring participants under the terms of the Plan 483,754 shares of Penney Company stock, having a market value of \$36,039,673.00. Penney Company has had an unbroken profit and dividend record from the time of its incorporation in Delaware in 1924.

40.

On July 1 of each year commencing with the year 1945 each participant who had attained, or in that year attained, the age of 60, as defined in the Plan, received a paid-up non-assignable annuity purchased with his Plan credits and, without cost, a number of

the shares of stock held by the Trustee computed under the formula of the Plan. By December 31, 1953 the Trustee had distributed to such retiring participants the total of 101,920 shares of Penney Company stock held by it in the Fund under the Plan, of which 7,163 were distributed prior to the three-for-one stock split in 1946.

41.

Each participant whose participation ceased prior to July 1, 1945, or thereafter but prior to such participant's reaching age 60, as defined in the Plan, or in case of death, his beneficiary, received his Plan credits as of the date his participation ceased but did not receive any of the shares of stock held by the Trustee.

42.

The purposes of the Plan were:

- (a) to inaugurate a compulsory retirement policy,
- (b) to help provide security for the future,
- (c) to provide liberal benefits on retirement and earlier separation,
- (d) to constitute an improvement over the former outright sales of Penney Company stock from time to time to associates, and
- (e) to act as a further incentive to those who were serving and preparing to serve
 - (i) by providing for credits to accounts from Company contributions measured by profits and from dividends on the Penney Company stock held in the Trust, and

- (ii) from the potential ownership of Penney Company stock to be received upon reaching retirement status.

43.

The stock provisions of the Retirement Plan are an integral part of the Plan.

44.

The provisions of the Plan, including those for mandatory retirement, acquisition of Penney Company stock by the Trustee, distribution of such stock to participants reaching retirement status, use of dividends for the benefit of participants leaving the Company upon retirement or earlier separation, participants' contributions and Company contributions, constitute a unified structure, and each such provision is inseparable from the Plan as a whole.

44½.

A. From the inception of the Plan in 1939 through 1953, the Administrative Committee consisted of men who were participants in the Plan, except that from July 1, 1951 to April, 1953, Mr. A. W. Hughes, who had ceased to be a participant, was on the Administrative Committee. The identity of such men changed from time to time.

B. From 1943 to April 20, 1946, the Operating Committee consisted of 8 men, 7 of whom were participants. From April 20, 1946 through 1951, said Committee consisted of 7 participants, except that from July, 1951, to the end of 1951, Mr. A. W. Hughes was on the Operating Committee, but he

was not a participant in the Plan during that period. During both periods the identity of the members of the Operating Committee changed from time to time.

C. From 1939 to 1951, the Board of Directors consisted of 11 men. From 1939 to 1945, 6 of said 11 men were participants in the Plan. In 1946, 5 of said 11 men were participants. In 1947, 6 of said 11 men were participants. From 1947 until 1950, 6 of the 11 were participants. In 1950 and until July 1, 1951, 6 of the 11 were participants. After July 1, 1951, 5 of the 11 were participants.

D. The men referred to in subparagraphs A, B and C above at no time used their position for their own benefit, and at all times acted in good faith and for the benefit of the trust.

45.

The Plan is liberal in that, although only participants reaching retirement status receive shares of stock in addition to their other credits, a participant leaving the employment of the Company at any time before reaching retirement status, regardless of his length of service or years of participation or the reason for his separation, not only receives back all of his own contributions to the Plan but also receives all other credits to his account, computed in the same manner as though he had reached retirement status.

46.

The fact that older employees, among them some members of the Company's Board of Directors, who

were among the first to qualify for retirement with stock, received a slightly greater number of shares than younger and future employees will receive when they retire, does not render the Plan unfair or discriminatory. There is a sound and rational basis for permitting employees who have not built up large credits for themselves under other provisions of the Plan to receive an advantage in connection with the distribution of stock under the formula set forth in Finding of Fact 31, subparagraph C.

47.

The Plan is generous and sound.

48.

The Plan does not:

- (a) encourage any passion for gambling,
- (b) take money from people who can ill afford to lose it,
- (c) encourage hope of gain without service or effort,
- (d) induce habits of waste, idleness or hatred of honest labor,
- (e) promote deterioration of moral qualities, or
- (f) discourage useful business and industry.

The Plan is not a lottery or a wagering contract; neither is it a Tontine contract.

49.

There is no proper basis for attacking the integrity of the executive officers and members of the Penney Company Board of Directors who were re-

sponsible for the adoption of the Plan, and who are responsible for its administration.

50.

Plaintiff Wells, during the period of his participation in the Plan from January 1, 1940 to August 31, 1948, received from the Penney Company regular salary totaling \$29,955, and in addition Manager's Contract Compensation totaling \$56,924.22. He contributed \$13,929.70 from his Contract Compensation to the Trust Fund under the Plan.

51.

On ceasing participation in the Retirement Plan on August 31, 1948 at the age of 52 years, plaintiff Wells had total credits in the Fund of \$22,563.48, consisting of:

(a) the total of his own contributions amounting to	\$13,929.70
(b) his share of the Company's excess profit contributions through 1947 amounting to.....	4,075.52
(c) his share of the Dividend Account at August 31, 1948, amounting to	4,558.26
	<hr/>
	\$22,563.48

All these credits were used to purchase for him installment refund annuities which plaintiff Wells elected to cancel, receiving his total credits of \$22,563.48 in cash. In addition he received on April 1,

1949, \$643.83 representing earning credits of the Fund.

52.

Plaintiff Albertsen, during the period of his participation in the Plan from January 1, 1940 to December 31, 1950, received from the Penney Company regular salary totaling \$48,900, and in addition Manager's Contract Compensation totaling \$137,052.71. He contributed \$30,213.13 from his Contract Compensation to the Trust Fund under the Plan.

53.

On ceasing participation in the Retirement Plan on December 31, 1950 at the age of 54 years, plaintiff Albertsen had total credits in the Fund of \$52,967.81, consisting of:

(a) the total of his own contributions amounting to.....	\$30,213.13
(b) his share of the Company's excess profit contributions through 1950 amounting to.....	10,386.23
(c) his share of the Earnings credit through 1950 amounting to.....	1,104.89
(d) his share of the Dividend Account at December 31, 1950, amounting to	10,280.94
(e) his share of insurance companies' rate credits (dividends) under the Group Annuity Contracts amounting to	982.62

Total \$52,967.81

All these credits were used to purchase for him installment refund annuities under which payments would commence on August 1, 1956, the year in which he would be 60, which annuities are still in force.

54.

There is no evidence in the case that plaintiff Wells, plaintiff Albertsen or any other former participant in the Plan, who did not attain retirement status, made any claim between 1940 and the commencement of this action that the Plan or Trust Agreement were invalid in any way.

55.

Plaintiffs Wells and Albertsen, as well as all former participants in the Plan who did not achieve retirement status, have accepted benefits which have included large contributions by the Penney Company. The Penney Company made its original contribution and its subsequent contributions to the Plan on the basis of acceptance forms signed by all participants in which they agreed to be bound by the terms of the Plan and Trust Agreement, and on the basis of the validity of the Plan.

56.

The action brought by plaintiffs Wells and Albertsen is brought by them on behalf of themselves and on behalf of those persons who were participants in the Plan during 1940 and 1941 and whose contributions formed one source of the receipts used by the Trustee in repaying the loan to the Continental

Bank and who separated from the Plan without attaining retirement status, and the heirs, legal representatives and beneficiaries of such former participants.

57.

The persons on whose behalf the plaintiffs Wells and Albertsen have brought this action constitute a class of former participants so numerous (being in excess of 690) that it is impracticable to bring them all before the Court. Such former participants are similarly situated with respect to the said named plaintiffs and have no interests that are in conflict with those of the named plaintiffs and are adequately represented by said named plaintiffs.

58.

It would be highly inequitable to permit plaintiffs Wells and Albertsen to recover in this proceeding, either on their own behalf or on behalf of the class for which they are suing.

Based upon the foregoing Findings of Fact the Court now makes the following:

Conclusions of Law

1.

Diversity of citizenship exists between plaintiffs Wells and Albertsen and defendants and has existed since the commencement of the action. The amount in controversy exceeds, exclusive of interest and costs, \$3,000.00. The Court, therefore, has jurisdiction over this case under 28 U.S.C. Sec. 1332.

2.

This action is properly maintainable in this Court by the plaintiffs Wells and Albertsen as a class action under Rule 23(a)(1) of the Federal Rules of Civil Procedure.

3.

The Trustee adequately represents the interests of all present participants in the Plan and it is therefore not necessary that such participants be made parties in this action under Rule 19 of the Federal Rules of Civil Procedure.

4.

The J. C. Penney Company Profit-Sharing Retirement Plan (for Management Staff) and Trust Agreement in connection therewith are to be construed in accordance with the laws of the State of New York.

5.

The stock distribution provisions of the Penney Company Retirement Plan are valid and legal and do not involve a lottery or other illegal scheme.

6.

The prohibition against lotteries, bookmaking and gambling in the New York Constitution and the New York Statutes defining a lottery were never designed to nor do they cover a situation of the kind involved in this action in which stock is distributed to employees who qualify under retirement or pension plans.

7.

The provisions of the Penney Company Retirement

ment Plan under which stock is held for distribution to employees who attain retirement status do not violate the prohibition against lotteries, bookmaking and gambling in the New York Constitution and the New York Statutes.

8.

The stock distribution provisions of the Penney Company Retirement Plan do not violate the public policy of the State of New York.

9.

The stock provisions of the Retirement Plan are an integral part of the Plan.

10.

Whether the stock provisions are considered separately or in connection with other portions of the Retirement Plan, the distribution of stock to only those persons who reach retirement age and otherwise qualify under the Plan is a valid and legal arrangement.

11.

The Retirement Plan and Trust Agreement and amendments thereto have at all times been qualified as an employees' trust under Sections 165 and 165(a) of the Internal Revenue Code.

12.

The stock provisions of the Retirement Plan do not conflict with Federal tax law.

13.

The fact that older employees, among them some

members of the Company's Board of Directors, who were among the first to qualify for retirement with stock, received a slightly greater number of shares than younger and future employees will receive when they retire, does not render the Plan fraudulent or illegal.

14.

There is no basis for attacking the integrity of the executive officers and members of the Penney Company Board of Directors who were responsible for the adoption of the Plan, and who are responsible for its administration.

15.

The Retirement Plan and Trust Agreement became a binding contract between the Penney Company and each participant, including plaintiffs, when such participant executed and delivered to the Penney Company his Participant's Acceptance Form.

16.

All funds received by the Trustee from Company contributions, participants' contributions, dividends on Penney Company stock and earnings of the Fund together with the 200,000 shares of Penney Company stock became the property not of any participant, but of the Trustee, subject only to the terms of the Retirement Plan and Trust Agreement.

17.

In one sense, all of the company's contributions can be characterized as being part of the compensa-

tion paid to participants; but that does not mean that the participants were entitled to receive such contributions or the benefits thereof in a manner other than that specified in the Plan itself; nor does it mean that the loan with which the stock was purchased was repaid solely from funds contributed by the participants.

18.

No participant had or has any right or interest with respect to the shares of Penney Company stock at any time held by the Trustee of the Plan except as prescribed by the terms and conditions of the Plan.

19.

The Court has already found that the Plan is valid, but even if by some technical construction the Plan was found to constitute a lottery or other illegal scheme, it would, under all the facts and circumstances herein, be highly inequitable to permit plaintiffs to recover either on their own behalf or on behalf of the class for which they are suing.

20.

Neither plaintiffs nor any member of the class whom they represent is entitled to receive any shares of the Penney Company stock held by the Trustee of the Penney Company Retirement Plan.

21.

Defendants are entitled to have judgment entered in their favor and against plaintiffs Wells and Al-

erick Yerke, Jr., and Paul R. Meyer (King, Miller, Anderson, Nash & Yerke), of their attorneys. Defendant, J. C. Penney Company, a corporation appeared by and through Clarence J. Young and Wayne Hilliard (Koerner, Young, McColloch & Dezendorf), W. H. Dannat Pell, Henry Stone and C. Robert Roll (Pell, Butler, Curtis & LeViness), of its attorneys. Defendant, The Chase National Bank of the City of New York, a national banking association, a predecessor in interest to defendant The Chase Manhattan Bank, a corporation, appeared by and through Clarence J. Young and Wayne Hilliard (Koerner, Young, McColloch & Dezendorf), of attorneys for said Defendant. Said The Chase Manhattan Bank having, subsequent to trial but prior to judgment herein, been substituted as a party defendant in place of The Chase National Bank of the City of New York at this time appears by and through Clarence J. Young and Wayne Hilliard (Koerner, Young, McColloch & Dezendorf), of attorneys for said substituted defendant.

The issues raised by the Pre-trial Order having been duly tried and the Court having filed its opinion on the 29th day of December, 1955 and the Court on the day of, 1956 having filed its Findings of Fact and Conclusions of Law directing judgment as hereinafter provided and being fully advised in the precises, it is now

Ordered, Adjudged and Decreed, that judgment be and the same is hereby entered in favor of defendants; it is further

Ordered, Adjudged and Decreed, that the action

herein be and the same is hereby dismissed on the merits as to the plaintiffs, Harvey L. Wells and Harry J. Albertsen and as to each and every member of the class whom they represent.

Dated: Portland, Oregon this 8th day of March, 1956.

/s/ GUS J. SOLOMON,
District Judge

[Endorsed]: Filed March 8, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Harvey L. Wells and Harry J. Albertsen, on behalf of themselves, and others similarly situated, plaintiffs above named, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 8, 1956.

/s/ KING, MILLER, ANDERSON,
NASH & YERKE

/s/ RALPH H. KING

/s/ FREDRIC A. YERKE, JR.

/s/ PAUL R. MEYER

Attorneys for Plaintiffs

Acknowledgment of Service Attached.

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents that we, Harry J. Albertsen, as Principal, and United Pacific Insurance Company, a corporation of the State of Washington, having an office and usual place of business in the City of Portland, County of Multnomah, State of Oregon, as Surety, are held and firmly bound unto J. C. Penney Company and The Chase Manhattan Bank, defendants above named, in the sum of Two Hundred Fifty Dollars (\$250), lawful money of the United States of America, for which payment well and truly to be made unto said J. C. Penney Company and The Chase Manhattan Bank, their successors and assigns, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly, severally and firmly by these presents.

Whereas, lately in an action pending in the United States District Court for the District of Oregon between Harvey L. Wells and Harry J. Albertsen, on behalf of themselves, and others similarly situated, as plaintiffs, and J. C. Penney Company and The Chase Manhattan Bank, as defendants, a judgment was entered against plaintiffs, and plaintiffs having filed a notice of appeal from said judgment to reverse said judgment on appeal to the United States Court of Appeals for the Ninth Circuit,

Now the condition of this obligation is such that,

if the said plaintiffs shall pay the costs if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award against plaintiffs if the judgment *if* modified, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, Harry J. Albertsen, as Principal, and United Pacific Insurance Company, as Surety, have caused their names to be hereto signed by their representatives duly authorized thereto, and said Surety has caused its corporate seal to be hereto affixed by its attorney in fact, this 2nd day of April, 1956.

HARRY J. ALBERTSEN

By FREDRIC A. YERKE, JR.

Of his Attorneys

UNITED PACIFIC INSURANCE
COMPANY

[Seal] By EMMA M. KEMP,
Attorney in Fact

Acknowledgment of Service Attached.

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL
EXHIBITS

Plaintiffs having designated the following exhibits to be included in the record on appeal in the above entitled and numbered action, pursuant to the provisions of Rule 75 (i) of the Federal Rules of Civil Procedure, and the court having considered the matter and being fully advised in the premises, it is hereby

Ordered that the clerk of this court transmit to the clerk of the United States Court of Appeals for the Ninth Circuit the originals, in lieu of copies, of the following Exhibits:

1, 1A, 2 through 9, 12, 14, 16, 18, 20, 22, 31, 37 through 39, 51, 55, 67 through 77, 79, 90, 91, 96, 99, 102 through 104, 109, 111, 114, 115, 120, 122 through 127, 129 through 139D, 140, 141, 145 through 155, 174, 175, 185 through 193, 194 through 207, 208A through D, 210, 211, 215A through H, 222A through D, 227A, 233 through 244, 245 through 254H, 260 through 263, 280, 282A through J, 292, 303 through 305, 309 through 311, 312A through D, 313 through 320, 323 through 326, 329 through 335.

Dated this 13th day of April, 1956.

/s/ GUS J. SOLOMON,
Judge

[Endorsed]: Filed April 13, 1956.

In the United States District Court
for the District of Oregon

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer of defendant the Chase National Bank of The City of New York; Answer of defendant J. C. Penney Company; Opinion of Judge Solomon; Order of substitution of party defendant; Findings of fact and conclusions of law; Final judgment; Notice of appeal; Bond on appeal; Designation of contents of record on appeal; Order transmitting original exhibits and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 6095 in which Harvey L. Wells and Harry J. Albertsen, on behalf of themselves, and others similarly situated are the appellants and J. C. Penney Company, a corporation, and The Chase Manhattan Bank, a corporation, successor in interest to The Chase National Bank of the City of New York are the appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings. The Pre-

A. Yerke, Jr., and Paul Meyers, of Attorneys for Plaintiff. Messrs. Clarence J. Young, W. H. Dan-net Pell, Henry Stone, Robert Roll, and Wayne Hilliard, of Attorneys for Defendants.

Court Reporters: Gordon R. Griffiths and John S. Beckwith. [1*]

The Court: Let's consider the time for filing briefs in the Wells-Albertsen case. When can you get in the first brief?

Mr. King: It is pretty hard to write two briefs at the same time. We could probably have our brief in by the date that theirs is due in the other case, on the 10th of August.

The Court: You will have until the 10th of August for the first brief.

Mr. Young: And three weeks for us, your Honor, thereafter.

The Court: That is September 1st. How about the 14th of September for the reply?

Mr. King: That is fine.

The Court: Then I will try to get the decision out by the end of September.

Has the Pre-Trial Order in the Wells-Albertsen case been signed already?

Mr. King: Yes, it has, your Honor.

Mr. Young: Yes.

Mr. King: There is that one page to be substituted.

The Court: I have already signed it, and I

* Page numbering appearing at top of page of Reporter's original certified Transcript of Record.

think Mr. Bishop has made the change. I have read the Pre-Trial Order in its entirety on this one.

Mr. King: Very well, your Honor. We this [2] morning handed Counsel for the defendants——

Mr. Young: If the Court please, may I interrupt Counsel just a moment?

At this time the defendants move the Court for an order dismissing the Wells-Albertsen action upon the ground that on the basis of the facts shown in the Statement of Agreed Facts in the Pre-Trial Order it is clear that the Plan and Trust Agreement in so far as they relate to the stock feature cannot conceivably be a lottery, as the plaintiff claims; that the Penney Company's retirement plan, approved by the stockholders of the company in 1940, serves a valid business purpose in providing benefits for the members of the Management staff of the company, approximately 1950 of whom are now participants.

The grounds upon which the plaintiffs claim it is a lottery are that the stock held by the Trustee of the Plan is only distributable to participants reaching the retirement age of 60 and who remain in the employ of the company until that age. As a matter of law, such conditions imposed upon the right to receive these shares of stock cannot convert this plan or any part of it into a lottery; that the condition requiring service in the company's employ until age 60 is a valid part of the contract of employment between the participants and the company.

The Court: The motion is denied. Go ahead. [3]

That means without prejudice. I may find with you subsequently, but at this stage I am going to listen to all the evidence.

Mr. Young: I understand.

Mr. King: This morning, your Honor, we presented counsel for the defendants with a list of the exhibits which we desire to offer at this time and which I will read into the record:

Exhibits 1, 1-A, 2, 3, 4, 5, 6, 23, 55, 74, 75, 76, 77, 123, 124, 125, 140, 141, 159, 160, 185, 186, 187, 188, 189, 190, 191, 192, 193, 208-A, 208-B, 208-C, 208-D, 210, 211, 222-A, 222-B 222-C, 222-D, 329, 330, 331, 332, 333 and 334.

The Court: Are you prepared to——

Mr. Young: No, we are not, your Honor.

The Court: All right. Tomorrow morning.

Mr. Young: May I ask until tomorrow morning at 10:00 o'clock?

The Court: Yes. Do you know at this time what exhibits you propose to offer?

Mr. Young: No, we don't, your Honor.

The Court: All right. At 10:00 o'clock tomorrow morning. Would you mind giving Mr. King a statement around 9:30 tomorrow morning?

Mr. Young: Yes, your Honor.

Mr. King: Thank you, your Honor.

Now, your Honor, following the suggestion [4] your Honor made the other day, in order to avoid repetition, with the consent of Counsel I would like to indicate the portions of the following depositions that I would like to have set forth in the record as

if they had been read into the record in the usual procedure.

The Court: Is there any objection to that, Mr. Young?

Mr. Young: I have no objection to the principle of avoiding repetition. We merely will wish to reserve our objections to the relevancy or materiality of the particular sections.

The Court: That is all right. You can do that.

Mr. Young: May I make this inquiry, your Honor? It is a technical matter of taking these page by page. May we have until tomorrow morning also to note our objections to the portions?

The Court: Oh, yes. I will assume that you are objecting to everything.

Mr. Young: That is a fairly safe assumption, your Honor.

Mr. King: The first is the deposition of A. J. Raskopf, and the portions are:

Beginning at the beginning of the deposition on Page 3 and continuing to the end of the fourth line from the bottom of Page 7, which reads, "Mr. Young: It may be so stipulated." [5]

Excerpts From Deposition of

A. J. RASKOPF

"A. J. Raskopf, called as a witness, being duly sworn, testified as follows:

"Mr. King: Mr. Young has some stipulations that he wishes to place in the record, and as I understand it, Mr. Young, they will be applicable to

(Deposition of A. J. Raskopf.)

all the depositions that are taken in New York without being reinserted in the record under such separate deposition, is that correct?

“Mr. Young: That is correct. Proceeding, then, Mr. King, with the stipulations, they are as follows:

“Notices of taking depositions of certain witnesses have been served in each of the two pending cases, namely Burkitt versus Penney Company and Chase Bank and Wells and Albertsen versus the same defendants; in addition, subpoenas for certain witnesses have been served; it is agreed, however, that to avoid the necessity of taking each deposition twice the court reporter may designate two copies of the depositions as originals, one for use in so far as applicable in the Burkitt case, the other for use in so far as applicable in the Wells and Albertsen case. This understanding, however, is without prejudice to the rights of the defendants [6] to contend that the two actions should or should not be consolidated for trial.

“It is further stipulated that notwithstanding the circumstance that the notices of taking depositions and subpoenas served fix specific times for the hearings at the board of directors’ room of J. C. Penney Company in New York, the actual time when any specific deposition is taken shall be fixed in accordance with the reasonable convenience of witness and counsel.

“In addition, to avoid the necessity of transporting voluminous documents from The Chase Bank in New York City to the board of directors’ room

(Deposition of A. J. Raskopf.)

of the Penney Company in the same city, the depositions of the witnesses Gardner and Burrows may be taken at the conference room of The Chase National Bank, No. 15 Broad Street, New York City.

“It is further stipulated that in respect to any original documents which may be identified as exhibits to any deposition photostats or other true and complete copies may be substituted with the same force and effect as the original, and such original document may be withdrawn by any party who produces such documents. [7]

“Mr. King, there is one other general stipulation that I had in mind, but I would suggest that you dictate at this time the specific ones that you wish, and then I can add one further at the end.

“Mr. King: The stipulations proposed by Mr. Young are acceptable.

“I offer the following stipulation:

“That the pages of the deposition of each witness be numbered consecutively and that any further depositions taken, whether intervening or not, be numbered consecutively throughout the entire depositions to be taken under the notices now outstanding at New York.

“It is further stipulated that a notary other than Mr. Bonyngé may swear witnesses, but that Mr. Bonyngé shall make the certificate to the deposition of such witnesses and shall make a separate certificate for each witness in each of the two cases.

“Mr. Young: The purpose of this portion of

(Deposition of A. J. Raskopf.)

your stipulation is to make it possible as I understand for Mr. Bonyngé to provide us with daily copy.

“Mr. King: That is right.

“Mr. Young: Is that all that you have, [8] Mr. King?

“Mr. King: It is further stipulated that in reading any deposition taken as provided in the notices and foregoing stipulations the word ‘plaintiffs,’ plural possessive, and ‘plaintiff’s,’ singular possessive or ‘plaintiffs,’ plural, or ‘plaintiff,’ singular, shall be read in accordance with the heading of the case in which the deposition is returned.

“It is further stipulated that exhibits produced on the various depositions shall be numbered consecutively, commencing with those produced in the first deposition and continuing through to the end of all depositions to be taken.

“Mr. Young: The stipulations as you have dictated them are satisfactory to the defendants. I do want to get this general stipulation if it is agreeable to you, that except as otherwise stipulated specifically between counsel it is understood that the depositions in the Burkitt case and the Wells and Albertsen case are subject to and governed by the applicable Rules of Civil Procedure.

“Mr. King: I would suggest a further stipulation, Mr. Young. May it be stipulated that [9] unless at the time an exhibit is offered for marking as an exhibit you specifically interpose an objection to its proper identification that it shall be deemed

(Deposition of A. J. Raskopf.)

that the identification of the exhibit was sufficient and proper, but that the same shall be subject to your objection as to materiality and relevancy in subsequent proceedings?

"Mr. Young: It may be so stipulated."

Then, turning to Page 9, the first two questions and answers:

"Q. Your name is A. J. Raskopf?"

"A. That is right.

"Q. And where do you reside?"

"A. Garden City, Long Island, New York."

Beginning again at the bottom of Page 9 with the question, and continuing to the third line on Page 10:

"Q. And what year were you elected secretary?"

"A. As of January 1, 1932.

"Q. And you have been secretary ever since that date?"

"A. I have."

Page 112, beginning with the first question which appears about the center of the page, and going through the marking of the exhibit, which is right about the middle of [10] Page 113:

"Q. Have you a copy of the profit-sharing plan presented to the meeting of the stockholders on March 21, 1940?"

"A. I have a copy of the Retirement Plan which was presented at the stockholders' meeting of March 21, 1940.

"Q. It was presented there for their consideration, wasn't it?"

"A. Yes, it was there, and available for—"

(Deposition of A. J. Raskopf.)

“Q. That is the one that is referred to in the minutes of that meeting, is it not? “A. Yes.

“Mr. King: I ask that that be marked Exhibit 1-A to the deposition of this witness.

“Mr. Stone: You want it marked Exhibit 1-A?

“Mr. King: Yes, it relates to those minutes and therefore comes right in as a part of it.

“Mr. Stone: It is just out of order.

“Mr. King: It is with the intent that you can work it in and go down the line of the index and get a statement of the attachments that relate to it.

“(Document headed ‘Profit-Sharing Retirement Plan (for J. C. Penney Company [11] management staff)’ consisting of 17 photostatic sheets, was marked Plaintiffs’ Exhibit 1-A for identification, Deposition of A. J. Raskopf, Cases 5965 and 6095, October 29, 1951, C. B.)”

Now, going from there to Page 424, beginning with the first question on that page, and continuing through Line 4 on Page 425:

“Q. Mr. Raskopf, according to some of the minutes now in evidence steps were taken by you as representing the company to qualify this profit-sharing retirement plan under Section 165-A of the Internal Revenue Code.

“A. That is right.

“Q. Can you state whether or not the contributions made by the company under paragraphs 6-A and 6-B of the Plan have been taken by the

(Deposition of A. J. Raskopf.)

company as deductions of compensation in the returns filed with the Internal Revenue Bureau?

"A. No, Mr. King, they have not been taken as deductions as compensation. They have been taken as deductions for contributions to the retirement plan.

"Q. Under Section 165-A of the Code?

"A. Yes. [12]

"Q. But they have been ever since the Plan was first effective? "A. Yes, sir."

That is all there is of the deposition of Mr. Raskopf.

Now, taking up next the deposition of Herbert H. Schwamb, Page 691, beginning at the top of the page, and continuing through the seventeenth line on Page 693, which line is also the seventh line from the bottom and ends with the words "Yes, sir."

Excerpts From Deposition of

HERBERT H. SCHWAMB

"Herbert H. Schwamb, called as a witness, being duly sworn, testified as follows:

"Mr. King: I wish to call your attention to the fact that the notice of the taking of the deposition of Mr. Schwamb does not give notice of the taking of his deposition in the capacity of a vice-president of J. C. Penney Company. I wish to inquire as to whether or not you are willing to stipulate that Mr. Schwamb may be examined as a vice-president

(Deposition of Herbert H. Schwamb.)
of J. C. Penney Company and his deposition taken
in that capacity.

“Mr. Young: It is so stipulated.

“Direct Examination

“Q. (By Mr. King): Will you state your name
to the reporter, please. [13]

“A. Herbert H. Schwamb.

“Q. Where do you reside?

“A. 45 West 54th Street, New York.

“Q. You started with the predecessor of the
present company in about 1923?

“A. I think it was the present company in 1923.

“Q. The record indicates that the present com-
pany commenced business January 1, 1925.

“A. It has always been one and the same to me.

“Q. At any rate, you started in with the J. C.
Penney Company in 1923? “A. Yes.

“Q. You are not sure whether it was then in-
corporated under the laws of Utah or the present
company incorporated under the laws of Delaware?

“A. I did not know that.

“Q. About 1940 you succeeded Mr. A. W.
Hughes as the person in charge of the personnel
department? “A. On January 1, 1940.

“Q. And upon the inception of the Profit-Shar-
ing Retirement Plan and pursuant to action taken
by the board of directors at meeting held December
5 and 6, 1939, you became a member of the adminis-
trative committee under that Plan?

“A. Yes. [14]

(Deposition of Herbert H. Schwamb.)

"Q. By virtue of your position as head of the personnel department, about January 1, 1940, you became a member of the operating committee?

"A. Yes, sir.

"Q. And by virtue of the adoption of the Profit-Sharing Retirement Plan and the actual operation commencing sometime in July or August, 1940, you became a participant thereunder?

"A. Yes, sir.

"Q. And have been ever since? "A. Yes.

"Q. Did you realize at the time that you became a participant under the Plan that in the event of your failure to attain a retirement status, on account of death, physical disability or discharge or voluntary resignation you would lose your opportunity to obtain any shares of stock?

"A. I certainly did.

"Q. You understood that as a participant?

"A. Yes, sir.

"Q. And you were willing to accept that hazard? "A. Yes, sir."

That is all of the deposition of Mr. Schwamb.
Then the deposition of John I. H. Herbert. On Page 660, all of that page: [15]

Excerpts From Deposition of

JOHN I. H. HERBERT

"Mr. King: Gentlemen, in the notice of the taking of the deposition of Mr. J. I. H. Herbert he was not described as a director of the J. C. Penney

(Deposition of John I. H. Herbert.)

Company. I wish to inquire now whether it may be stipulated or will be stipulated that his deposition may be taken in his capacity as a director of J. C. Penney Company.

"Mr. Young: No objection.

"Mr. King: I want to know whether it is so stipulated.

"Mr. Young: Yes, it is so stipulated."

Page 661, beginning at the first question on that page, through the fifth line on Page 662:

"Q. Would you state your name?

"A. John I. H. Herbert.

"Q. Where do you reside?

"A. 10 Cooper Road, Scarsdale, New York.

"Q. I believe you started in with the J. C. Penney Company about 1911.

"A. I went with Mr. J. C. Penney in 1911, May 8th.

"Q. And you were a director and treasurer of the Utah company from about 1913 to 1924?

"A. I was until the new company took over.

"Q. And after the new company was formed, the present company, you became a [16] director in that company? "A. Correct.

"Q. And also served in a capacity as treasurer and third vice-president? "A. Right.

"Q. Do you remember this Profit-Sharing Retirement Plan that was inaugurated in 1940?

"A. I do.

"Q. I show you Exhibit 125, being the booklet which the record indicates was sent out in the year

(Deposition of John I. H. Herbert.)

1940. Did you receive one of those as a participant in the Plan? "A. I did."

Page 663, beginning with the first question on that page, through the tenth line on that page, which reads, "I was."

"Q. At the time you became a participant in the Profit-Sharing Retirement Plan did you know that you might lose any opportunity to receive the stock, by reason of your death or physical incapacity or discharge prior to attaining retirement status? "A. I did.

"Q. And you were willing to accept that [17] hazard, were you?

"A. I was."

That is all of the deposition of Mr. Herbert.

Taking up the deposition of

MR. WEIDERMAN

Page 194, commencing with the first question, to the end of that page:

"Q. Will you state your name, please.

"A. R. C. Weiderman.

"Q. Where do you reside, Mr. Weiderman?

"A. Manhasset, New York.

"Q. And what is your present official position with J. C. Penney Company? "A. Comptroller.

"Q. And you have served in that capacity since December 3, 1945? "A. Yes.

"Q. Prior to that were you Assistant Comptroller? "A. Yes.

(Deposition of R. C. Weiderman.)

"Q. For about how many years?

"A. About six months.

"Q. And when did you first become connected with the company? "A. In June, 1916.

"Q. In the Comptroller's department, was it?

"A. All of the time except about 20 months [18] in one of the purchasing departments back in 1920."

Page 223, beginning with the second question on that page, which is in the fifth line, to the end of Line 3 on Page 225:

"Q. Now, Mr. Weiderman, when a person retires under this profit-sharing retirement plan he gets a certain number of shares of stock. Is that correct? "A. That is correct.

"Q. And does he also get a percentage of the dividend account?

"A. No, sir. Pardon me. That is used to buy him an annuity.

"Q. I know, but he gets the benefit of it, the money back?

"A. He gets it in the form of an annuity.

"Q. He gets the amount of money to be applied toward his annuity, which is based upon a percentage of the then dividend account, is that correct? "A. That is correct.

"Q. Suppose that he applies for retirement and is refused retirement. What becomes of the shares which he would have received if he had been retired? "A. They remain in a trust.

"Q. Who do they go to? [19]

(Deposition of R. C. Weiderman.)

"A. That is a very hard question to answer. I would not be able to answer that question who they go to.

"Q. It is what?

"A. I would not be able to answer the question who they go to.

"Q. You could answer this part, could you not, they go to someone other than the person that is denied retirement, do they not?

"A. Eventually they might go to somebody else.

"Q. You mean that they might keep denying retirement to everybody, so that they never go to anybody, is that correct?

"A. They cannot deny retirement to everybody in the Plan because every man who reaches 60 must be retired.

"Q. Directing your attention to Exhibit 140 to your deposition, being headed 'Participants out between 1/1/41 and 7/1/45 who were 60 years of age or over,' what became of the shares that would have gone to Mr. Pearson if he had been permitted to retire?

"A. They remained in trust.

"Q. What became of the shares that would have gone to Mr. McAlpine if he had been permitted to [20] retire?

"A. They remained in trust."

Page 228, beginning with the third question on that page, which begins at the beginning of the eighth line, through to the end of the fifteenth line

(Deposition of R. C. Weiderman.)

on Page 236, which reads: "as far as stock was concerned."

"Q. Mr. Weiderman, do the persons who are members of the general office compensation plan, Exhibit Y, hold contracts with the company covering their employment?

"A. I would say no to that question.

"Q. Do the managers of the respective stores of the J. C. Penney Company hold contracts covering their employment?

"A. Yes.

"Q. And has that been true since prior to 1940?

"A. I believe it was before 1940, Mr. King.

"Q. So that if a manager is employed and was employed, we will say, at or prior to January 1, 1940, he automatically became a participant under this profit-sharing retirement plan?

"A. If he had a contract that was effective on January 1, 1940, he actually was a participant.

"Q. And whether or not he became entitled to any stock under the provisions of that Plan, any [21] shares of stock, was contingent upon his reaching what is referred to in the Plan as 'Retirement status,' is that right?

"A. That is correct.

"Q. So that if he was killed or became incapacitated, physically incapacitated, to continue with his work he would thereby lose any possibility of acquiring any such stock?

"A. Under the terms of the Plan he would not be entitled to any stock.

(Deposition of R. C. Weiderman.)

“Q. And if he was discharged he would lose any right to stock?

“A. The same answer as to the question previously.

“Q. And that stock would be held in the Plan for the benefit of either the then participants or some later participant. Is that correct?

“A. I would say all stock in the Plan is held for the benefit of the participants of the Plan.

“Q. I mean that suppose a man had been a participant until he was 59 years and 360 days old and was killed on that day, the stock that he would have had five days later would become the potential property of the other participants in the Plan?

“A. It would become part of the Plan.

“Q. And the amount of stock that directors retiring [22] on July 1, 1945, receive would be increased by the fact that retirement had been refused to participants who were aged 55 during that year?

“The Witness: Could you read that question?

“(The question was read by the reporter.)

“The Witness: I am sorry, but I would like to have it read again.

“(The question was re-read by the reporter.)

“The Witness: I do not think that was the question. There are a lot of participants aged 55 who did not leave the company.

“Q. Yes, but on your list here, which is Exhibit 141, there was Mr. A. G. Dunn who was aged 55

(Deposition of R. C. Weiderman.)

and who was denied retirement and was shown as withdrawing from the Plan on June 30, 1945. If Mr. Dunn had been permitted to retire on July 1, 1945, the amount of stock received by Mr. Herbert would have been decreased, would it not?

"A. I cannot answer that question.

"Q. Did you not ever make a compilation to ascertain that?

"A. We did not.

"Q. Did you not assist Mr. Raskopf in preparing the proxy statement which is marked as Exhibit 60 to the deposition of Mr. Raskopf? [23]

"Mr. Pell: For what year is that?

"Mr. King: It is for the annual meeting—I will give you the year in just a minute—the year 1945 is the year. Exhibit 60 is the proxy statement for the annual meeting of the stockholders to be held on April 20, 1945.

"The Witness: I helped to prepare that statement.

"Q. Yes, and I would call your attention to the footnote 5 appearing on the—I guess you would call it the third page, which reads as follows:

" 'Mr. Herbert and Mr. Ross having reached the age of 60 years will be eligible for retirement on July 1, 1945, as participants in the Plan. In the event of their retiring as participants in the Plan on that date, in addition to an annuity benefit shown on the foregoing page, it is estimated that Mr. Herbert will be entitled to receive approximately 816 shares and Mr. Ross approximately 790 shares out

(Deposition of R. C. Weiderman.)

of the shares of the company's stock held by the trustee for the purpose of distribution to retiring participants under the terms of the Plan as outlined in the preceding paragraph 4(i).' [24]

"You assisted Mr. Raskopf in making that estimate?

"A. Yes, sir.

"Q. Is it not a fact that instead of receiving that amount of stock Mr. Herbert and Mr. Ross received shares of stock as shown on Exhibit 67 to the deposition of Mr. Raskopf, to-wit: 830 shares for Mr. Herbert and 803 shares for Mr. Ross?

"A. That is correct.

"Q. And is it not a fact, Mr. Weiderman, that if Mr. Dunn had been permitted to have retired on July 1, 1945, the ratio of the total contributions of Mr. Herbert to the total contributions then in the fund would have been reduced below the figures shown on Exhibit 67, to-wit: below .005534367268?

"A. It would have been changed slightly, but your question was would Mr. Dunn's retirement have changed the number of shares. That is a question I cannot answer.

"Q. If the percentage was reduced and you applied it to a constant factor of 450,000 shares, it would have been reduced, would it?

"A. Not necessarily, because that decimal would reach so far out to the right of the decimal point it may have made no difference in the number of shares. [25]

(Deposition of R. C. Weiderman.)

“Q. It would not have amounted to one-half of one share, is that your answer?

“A. We do not issue shares in halves.

“Q. I know you do not.

“A. Because the amount would be so small compared to the total.

“Q. The total contribution of Mr. Dunn was \$2,353.29? Is that correct?

“A. That is correct.

“Q. I note that in the same exhibit, No. 141, Mr. J. Ehlers is shown with contributions of \$5,629.82. Laying that one to the side, the next one is J. B. Carpenter, who had contributions of \$11,373.93, who is shown as withdrawing from the Plan on May 15, 1945. If he had been permitted to retire on July 1, 1945, would your answer still be the percentage of Herbert would not be reduced to such an extent as to affect one share?

“A. I am sorry; I did not make that statement in my testimony. I cannot answer the question.

“Q. Are you a slide rule man?

“A. No, sir. Thank you.

“Q. You have a machine, though?

“A. That is right.

“Q. That machine runs these readily, does it not? [26]

“A. Yes.

“Q. You could tell us what the effect of—let us assume this, that both Mr. Dunn and Mr. Carpenter had been permitted to retire on July 1, 1945—

(Deposition of R. C. Weiderman.)

what would the effect have been on the number of shares that Mr. Herbert would have received?

“A. My answer must be the same, because those amounts are rather small compared to the total amount and I do not know that it would have changed that decimal sufficiently to have changed the number of shares.

“Q. But it would have the effect of reducing the percentage figure somewhat, would it not?

“A. It would have the effect of reducing that decimal to a very small degree.

“Q. And that would be true of a similar situation in any year, would it not?

“A. Just what do you mean by that?

“Q. Well, where some man was 55 and he was denied retirement, any director that retired in that year would get a slightly lower percentage because his total contributions would be a lower percentage of the total contributions then in the fund if somebody else was still in the retirement fund on [27] July 1st?

“A. That would be mathematically so, but whether it would have changed the number of shares I could not say.

“Q. Directing your attention again to Exhibit 141——

“A. Which one is that?

“Q. Exhibit 141. Ehlers, it starts with——

“The Witness: That is 141.

“Q. Yes. We might as well mark it. The other one is 140.

(Deposition of R. C. Weiderman.)

"Mr. Young: That starts with Foote.

"Mr. King: 140 starts with Foote.

"Q. Directing your attention again to Exhibit 141 to your deposition, if Mr. Carpenter and Mr. Dunn had been permitted to retire on July 1, 1945, the percentage shown opposite the name of J. I. H. Herbert in this compilation marked Exhibit 67 would have been reduced as it was applied to the amount in the dividend account, would it not?

"It would be changed to the same degree as it would as far as stock was concerned."

Beginning again on Page 253 with the first question on that page, which is about the center of the page, and continuing to the end of Line 1 on Page 258:

"Q. Now, Mr. Weiderman, directing your attention [28] to Item A of the subpoena served upon you on October 30, 1951, which calls for the record showing the following information with respect to J. I. H. Herbert, a participant under the Profit-sharing Retirement Plan, his personal contribution from his compensation for the years 1939 running through the year 1945, and yesterday I believe you stated that he made none for the year 1945. Do you have the information with respect to the other years?

"A. Yes, sir.

"Q. Will you produce it, please?

"A. You will notice that the other two men are included on that same statement, Mr. King.

"Q. I will ask you further questions, then. Un-

(Deposition of R. C. Weiderman.)

der Item B of the same subpoena like information was called for with respect to Mr. W. A. Reynolds extending through the year 1947, but Mr. Reynolds made no contribution for the year 1947?

“A. Correct.

“Q. And Item C of the same subpoena calls for like information with respect to Mr. A. W. Hughes extending to the year 1951, but Mr. Hughes made no contributions for the year 1951, did he? [29]

“A. Correct. Nobody has yet.

“Q. And in response to those three items of the subpoena you have now handed me a compilation from your records setting forth the information requested under the three items, all on one sheet, is that correct?

“A. Yes, sir.

“Mr. King: I ask that the sheet produced by the witness be marked as Exhibit 159 to his deposition.

(“Sheet headed ‘Record of personal contributions’ was marked Plaintiffs’ Exhibit No. 159, Deposition of R. C. Weiderman, Cases 5965 and 6095, October 31, 1951, C. B.)

“Mr. King: Now I ask Counsel whether it will be stipulated that the figures set forth on Exhibit 159 are a correct transcript of the original records under the control of Mr. Weiderman.

“Mr. Young: It is so stipulated.

“Q. I call your attention to Item D of the same subpoena calling for the records showing the total contributions of all participants in the Profit-shar-

(Deposition of R. C. Weiderman.)

ing Plan as of each of the following dates, and the dates are as follows: July 1, 1945, July 1, [30] 1946, July 1, 1947, July 1, 1948, July 1, 1949, July 1, 1950, July 1, 1951. Have you that information?

“A. Yes.

“Mr. King: The witness has just handed me a sheet headed ‘Contributions of all participants on July 1 of each year shown.’

“Q. That means the contributions of all participants in the fund as of that date, is that correct, Mr. Weiderman? “A. Yes.

“Mr. King: Will it be stipulated by Counsel that the figures set forth on this sheet produced by the witness are a correct reflection of what is shown on the actual original records from which he compiled them?

“Mr. Young: We so stipulate.

“Q. You did compile it from the records under your supervision? “A. That is right.

“Mr. King: I ask that the sheet so produced by the witness be marked Exhibit 160 to his deposition.

(“Sheet entitled ‘Contributions of all participants on July 1 of each year [31] shown,’ was marked Plaintiffs’ Exhibit No. 160, Deposition of R. C. Weiderman, Cases 5965 and 6095, October 31, 1951, C. B.)

“Q. Mr. Weiderman, during your examination yesterday you produced a compilation headed, ‘Participants other than retirement out 1/1/45 to 7/1/49, who were 55 years of age or over.’ On that list I find as the tenth name under the heading ‘Name’

(Deposition of R. C. Weiderman.)

H. J. Johnson, who is shown as in the accounting department of the New York office. Did you know Mr. Johnson? "A. Yes.

"Q. And what was his position with the company, just an accountant or what?

"A. He was an accountant.

"Q. And I note as shown on that exhibit that he lacked about four months of attaining the age of 60 at the time that he went out of the Plan as a participant. Do you know why he was not permitted to retire?

"A. Mr. Johnson was totally disabled."

On Page 259, the fourth question, which is the beginning of the ninth line, and continuing through to Page 266, at the end of Line 16, which reads, "That is correct." [32]

"Q. Did you know Mr. G. H. Crocker?

"A. Yes, sir.

"Q. Who is also shown on the same exhibit?

"A. Yes, sir.

"Q. What was the condition of his health prior to his death?

"A. I was not that close to Mr. Crocker to be able to answer that question, Mr. King.

"Q. You do not recall whether his death was sudden or not?

"A. To my recollection, he died suddenly.

"Q. And the stock to which he would have been entitled if he had survived to age 60 remained in the Plan?

"A. All stock remains in the Plan until it is ac-

(Deposition of R. C. Weiderman.)
tually issued to retiring participants.

“Q. And the same situation would apply to the other persons listed as deceased on the same sheet, Exhibit 141, to which I have been referring?

“A. The same answer would apply, Mr. King.

“Q. Now, with respect to these statements from The Chase National Bank as Trustee which were marked on your deposition as exhibits, in each instance having four separate divisions, now [33] Exhibits 130-A, 130-B, 130-C and 130-D, and the like subdivisions of Exhibits 131, 132, 133 and 134, can you tell me from examining those on what date the loan made by the Continental Illinois National Bank & Trust Company to The Chase National Bank of the City of New York as Trustee was paid off?

“A. I believe so.

“Q. What date would it be?

“A. I have not got it here.

“Mr. Young: You may refer to the document if you wish.

“Mr. King: Certainly, I want you to refer to it.

“The Witness: I haven’t the documents here, but I can get them.

“Mr. King: I wish you would, as long as it is possible to get them, and then we can complete that.

“Mr. Young: Do you wish to delay the deposition until they arrive?

“Mr. King: Yes, it will only be a minute.

“(Short recess.)

“The Witness: Do you wish me to read off the dates, Mr. King?

(Deposition of R. C. Weiderman.)

"Q. No, I just want to know the final date when the [34] loan was paid, if you can tell me.

"A. The final date was December 27, 1941.

"Q. And do you know whether or not any of the contributions made by the participants in the Plan up to that date were used in discharging that loan?

"A. The trustee presumably used all funds received for the payment of that loan.

"Q. And sometime in 1940 you paid over to the trustee such amounts as were contributed by participants from their 1939 compensation, is that right?

"A. Yes.

"Q. And in 1941 you paid over to the trustee such amounts as were contributed by the participants from their 1940 compensation?

"A. Yes, sir.

"Q. And those amounts were used by the trustee in reduction of that loan?

"A. The trustee used all funds received for the reduction of the loan; that is correct.

"Q. In other words, your answer is that if those funds were paid over they were used by the trustee in discharge of the loan?

"A. My answer is that the trustee used all funds [35] received to pay off the loan.

"Q. I will put it in another way. The trustee received those funds prior to December 27, 1941?

"A. Yes.

"Q. He may have used those funds together with other funds in discharging the loan?

"A. He used all funds received.

(Deposition of R. C. Weiderman.)

"Q. Now, directing your attention to this Exhibit 159 headed 'Record of personal contributions' on which appear those of Mr. J. I. H. Herbert, Mr. W. A. Reynolds and Mr. A. W. Hughes, I also direct your attention to Exhibit 67 to the deposition of Mr. Raskopf and to the percentage shown in the fifth column of figures on that exhibit; I hand you the exhibit. Opposite Mr. Herbert that percentage is 00.5534367268, is that correct?

"A. That is right.

"Q. Now, as of that date can you state what the percentage of the then contributions of Mr. Hughes bore to the total contributions then in the fund?

"A. If Mr. Hughes' contributions were exactly the same as Mr. Herbert's, the percentage would be the same. I have not got Mr. Hughes' contributions unless I add these two figures. [36]

"Q. I show you again your Exhibit 159 and ask you if that does not show that the contributions of Mr. Hughes under the plan were identical with those of Mr. Herbert. "A. It does.

"Q. And therefore your answer would be that the percentage as of July 1, 1945, would be the same as that shown for Mr. Herbert on this Exhibit 67?

"A. That is correct.

"Q. Now, directing your attention to the same Exhibit 159, and to Exhibit 69 which I hand you, on Exhibit 69 is shown the percentage as applying to Mr. W. A. Reynolds who retired July 1, 1947, and that percentage is shown as 00.603672618 per cent, is that correct? "A. That is correct.

(Deposition of R. C. Weiderman.)

“Q. Now I will ask you what the per cent of the contributions then in the fund of A. W. Hughes bore to the total contributions then in the fund as of July 1, 1947.

“A. It would be identical with Mr. Reynolds’.

“Q. Now, Mr. Hughes retired as of July 2nd—
July 1st was a holiday——

“A. Yes.

“Q. And his percentage is shown on Exhibit 73, which [37] I hand you?

“A. Yes.

“Q. And that percentage as of that time of his contributions to the total contributions then in the fund was 00.612215861 per cent, is that correct?

“A. That is right.

“Q. Can you explain from what cause or reason the per cent of Mr. Hughes’ contributions then in the fund to the total contributions then in the fund increased between the date of July 1, 1945, when it was 00.5534367268 per cent to July 1, 1951, when it was 00.612215861 per cent?

“A. That is because the contributions of the participants who left the Plan were not offset by the new additions, the contributions of the new participants coming in.

“Q. Now, in Exhibit 73 it shows that Mr. Hughes upon his retirement received share of stock in the total amount of 2,755 shares, is that correct?

“A. That is correct.

“Q. But Mr. Herbert, who retired on July 1, 1945, received shares of stock which expressed in the present shares would amount to 2,490 shares?

“A. That is correct. [38]

(Deposition of R. C. Weiderman.)

"Q. So that Mr. Hughes has by virtue of the increase of his percentage received an additional 265 shares, is that correct?

"A. That is correct, and it is also true of all other participants who retired on that same date.

"Q. Well, they did not receive that many, but they received some increase, is that right?

"A. The same percentage would apply to all participants.

"Q. But the answer to my question is that Mr. Hughes did receive an additional 265 shares? I believe that is the correct figure; you might check it.

"A. That is correct."

Beginning again on Page 282, the seventh line, which begins with the words "The Witness," and continuing through the seventeenth line on Page 283, which reads, "That is correct":

"The Witness: May I have an opportunity to clarify one of my answers?

"Mr. King: Certainly, at any time.

"The Witness: You asked me a question why Mr. Hughes' percentage had changed between those two years.

"Q. That was between July 1, 1945, and July 1, 1951?

"A. That is correct. There may be another reason [39] in addition to the one I gave, and that is this, that those percentages are based on a proportion of the individual's contribution compared to the total, and that ratio might change over that period simply because Mr. Hughes may have received—or

(Deposition of R. C. Weiderman.)

may have contributed possibly a little larger percentage than other participants.

“Q. Well, the contributions are uniform for anyone who received more than \$300 a year, are they not?

“A. The percentage is, but not the amount.

“Q. That is true, but if they all contributed say 20 per cent of their compensation over that period of time and there were no withdrawals and no deaths the percentage would be constant during that period of years, would it not?

“A. That would only be true if everybody received the same amount each year, Mr. King.

“Q. Is your last statement intended to supplement your prior answer? “A. That is right.

“Q. In other words, you think the percentage increased because of certain terminations as participants in the Plan that were not offset by contributions from new participants, and also for the last reason you stated? [40]

“A. That is correct.”

On Page 285, beginning with the beginning of the third line, which is the first question on that page, through the end of the eleventh line, which is the end of the answer to the first question:

“Q. As a participant of course you knew that funds that you contributed from your 1939 compensation and also from your 1940 compensation were being used to discharge the indebtedness due from The Chase National Bank of the City of New York,

(Deposition of R. C. Weiderman.)

trustee, to the Continental Illinois National Bank & Trust Company?

"A. I knew that all receipts by The Chase National Bank were used to pay off the loan."

That completes the deposition of Mr. Weiderman.

Now the deposition of Mr. Albert W. Hughes:

Excerpts from deposition of

ALBERT W. HUGHES

Beginning on Page 320, with the beginning of the deposition on that page, and continuing through the twelfth line on Page 322, which reads, "Executive Vice-President."

"Albert W. Hughes, called as a witness, being first duly sworn, testified as follows:

"Direct Examination

"Q. (By Mr. King): State your name, please.

"A. Albert W. Hughes.

"Q. You commonly sign your name as A. W. Hughes? "A. Yes, or Al Hughes.

"Q. Where do you reside?

"A. New Rochelle, New York.

"Q. Were you born in Missouri, Mr. Hughes?

"A. No, sir. I was born in Skaneateles, New York.

"Q. I believe you are a college graduate, Mr. Hughes. "A. That is right.

"Q. What school? "A. Colgate.

"Q. What year? "A. 1911.

(Deposition of Albert W. Hughes.)

“Q. What year did you go to Moberly, Missouri?

“A. 1920.

“Q. Did you accept some employment with J. C. Penney Company there?

“A. I became a salesman trainee in the Moberly store.

“Q. How many years were you in Moberly?

“A. Two years.

“Q. Then did you assume a managership somewhere?

“A. No. I went to Eureka, Utah, as assistant manager of the store, and some six months later was made manager of that store.

“Q. How long did you remain there as manager? [42]

“A. About a year and a half, at which time I went to Athens, Georgia, and opened a new Penney store.

“Q. How long were you in Athens?

“A. Approximately a year and a half.

“Q. Then did you come to New York?

“A. Yes, sir.

“Q. And you have been here in the New York office ever since? “A. That is right.

“Q. In what year did you become head of the personnel department? “A. In the year 1937.

“Q. And you relinquished that in 1940, did you?

“A. That is right.

“Q. What position did you take up in 1940?

“A. I had been previously first vice-president and head of the personnel department from 1927 on,

(Deposition of Albert W. Hughes.)

and in 1940 I relinquished the personnel department to devote myself more to the general activities of the company, and they changed my label to executive vice-president.

“Q. In 1940? “A. 1940.

“Q. I thought in 1943 you became executive vice-president. [43]

“A. It may be the title was changed in 1943.

“Q. In 1946 you became president?

“A. Yes. I am not sure of the date about being executive vice-president.”

Beginning again on Page 334, at the top of the page, and continuing over onto Page 340 to the end of the nineteenth line, which has only in the line the word “basis”.

“Q. I direct your attention first to the minutes of the annual meeting of stockholders held March 21, 1935, Exhibit 74 to the deposition of Mr. Raskopf. Do you recall whether or not you were present at that meeting? “A. I was.

“Q. So you were familiar with the action taken there with respect to the sale of stock?

“A. I was.

“Q. And directing your attention to Exhibit 75, the minutes of the board of directors of April 30, 1935, you are shown as being present at that meeting? “A. That is correct.

“Q. And you were familiar with the action taken by the board of directors with respect to the sale of stock?

“A. I have not read this. I assume that.

(Deposition of Albert W. Hughes.)

“Q. You better read it.

“A. (After reading exhibit): Yes, sir. [44]

“Q. Did that refresh your recollection?

“A. Yes, sir.

“Q. Directing your attention to Exhibit 76, being minutes of the special meeting of stockholders held November 20, 1936, do you recall whether or not you were present at that meeting?

“A. I assume that I was, because I think I attended all stockholders' meetings for the last 15 or 18 years.

“Q. Will you examine those minutes and see whether your recollection is refreshed as to whether you were present or not?

“A. (After examining minutes): Yes, sir.

“Q. Directing your attention to Exhibit 77, being the minutes of regular meeting of the board of directors held November 24, 1936, you are shown as among those directors present.

“A. Yes.

“Q. Will you examine those minutes and state whether you recall the action taken by the board with respect to the sale of stock?

“A. (After reading): I do.

“Q. Up to and including the actions taken at those meetings, had it been the policy of J. C. Penney Company from time to time to permit managers and [45] other executives to acquire shares of stock of the company?

“A. It had.

“Q. And that had been the policy that had been looked upon with favor originally by Mr. Penney and then by Mr. Sams and finally by yourself?

(Deposition of Albert W. Hughes.)

"A. Yes, sir.

"Q. In that the policy which is referred to in Exhibit 125, being this original profit-sharing retirement plan booklet, page 22, in the second paragraph where, under the heading of 'Purpose,' it is stated:

"'It is further intended to include and continue the principle of ownership participation which has been such a powerful incentive to the management staff in all the development and operation of the company'?

"A. That is referred to, and also the original basis on which this company operated, of partnership and ownership, which is the original participation basis.

"Q. You never participated in that?

"A. I did.

"Q. When the J. C. Penney Company was a Utah corporation in the years 1917 to 1925? [46]

"A. Yes, sir.

"Q. With whom were you a partner?

"A. I was in Eureka, Utah, known as a try-out manager. When I went to Athens, Georgia, Store 570, I was a partner with Mr. Sams, who owned a third, and they took my note for a third ownership, and then there were two other partners who were in the New York office. Mr. Dahl in the accounting department was one. I am not sure of the other. I would have to check my records to be sure of that.

"And later, I would add that Mr. Sams sold one-half of his third interest to a Mr. John Weber, who

(Deposition of Albert W. Hughes.)

was the man under whom I had trained in Moberly.

“So that actually there were Mr. Sams, with a one-sixth ownership in that store; Mr. Weber, a one-sixth owner; while I was a third owner; Mr. Dahl, and another man from the New York office. I would have to check my records on that. He owned a one-sixth interest.

“Q. This man you trained with was whom?

“A. Mr. John Weber.

“Q. Did he come to the New York office, too?

“A. No, sir.

“Q. In those days it was the practice of providing [47] additional compensation for men in the New York office by permitting them to become partners in some of the outlying stores?

“A. That is correct, but it was usually done in the early days by Mr. Penney or Mr. Sams or one of the senior partners giving up their rights to purchase an interest in a new store and assigning that right to a man in the New York office to give them an ownership.

“Q. Mr. Dahl in New York, and this one named—whose name you have forgotten?

“A. I am ashamed of myself, but I cannot recall the name. I checked it once and have not checked it in five years.

“Q. The original plan was that various men in partnership owned the stores and they incorporated the business in 1925 that was abandoned, was it not?

“A. The abandonment was started then but it

(Deposition of Albert W. Hughes.)

was not actually completed, the workings out of it, for a period of years, four or five years.

"Q. You eventually sold your one-third interest in the Athens store, did you?

"A. The one-third interest I had in the Athens store was converted under the new plan in 1927 into [48] common and preferred stock of the J. C. Penney Company.

"Q. And that was true eventually of all the stores that were owned as partners?

"A. That is correct.

"Q. So that those partners wound up as owners of stock of the J. C. Penney Company?

"A. That is right.

"Q. Of the present J. C. Penney Company?

"A. That is right. Yes, I think so, because the Delaware corporation—I think that is correct, yes.

"Q. And that principle of ownership participation was a very important factor in your opinion in the development of the Penney Company over the years? "A. That is correct.

"Q. It was an objective that held the interest of the managers and of the people in executive positions in the company?

"A. That is correct. I might add, though, that I think it was not the only objective.

"Q. What other ones did you have in mind?

"A. I am thinking of the time when we developed a new plan in 1927 for compensation for the central [49] group. I am thinking also of other com-

(Deposition of Albert W. Hughes.)

pensation plans which we have which do not necessarily involve stock ownership.

“Q. Have you some general plan of accident disability and health insurance for the company employees?

“A. No. We have a J. C. Penney Company Association of Delaware which handles group insurance and permits men to buy certain types of insurance on a preferred basis because it is a group basis.”

Continuing again on Page 466, beginning with the third question which appears in the eleventh line on that page, and continuing over to the end of the sixth line on Page 468, which reads, “Answer: Yes, sir.”

“Q. When you became a participant in the Plan you realized, did you, that as stated on Page 7 of Exhibit 125 under the sub-heading B, Other Separations:

““Any cases other than retirement, including death, resignation, dismissal, physical or other incapacity, etc., will fall under this provision.”

And the provision that it refers to was that the participant would have to withdraw from the Plan.

“A. Yes, sir. [50]

“Q. In other words, that is a hazard and you and every other participant would have to accept it?

“A. Yes, sir.

“Q. And after the Plan became a formality every manager of the Penney Company either had to ac-

(Deposition of Albert W. Hughes.)

cept that hazard or immediately cease his employment. Is not that correct?

"A. Every manager on contract and every participant in the general office compensation plan had to either sign an acceptance card for the Plan or cease active continuance of the duty he had. I guess that answers your question yes. I want to be sure of my language.

"Q. That is all right. You be just as careful as you care to be, and I know you have been. He was given the option of giving up his employment or signing this acceptance blank, was he not?

"A. Yes, sir.

"Q. And if he signed this acceptance blank, then he accepted a hazard with respect to his ever acquiring stock in the event of his withdrawal for any cause other than retirement, which includes his death, resignation, his dismissal, physical or other incapacity?

"A. Yes, sir.

"Q. You as a participant were willing to accept [51] those hazards?

"A. Absolutely, yes.

"Q. And the other directors who were participants felt the same way about it?

"A. Yes, sir."

Those portions of those depositions are offered with the reservations Counsel has made for tomorrow morning.

The Court: Subject to objection, they are admitted.

Mr. Yerke: Call Mr. Jenkins.

JOHN S. JENKINS

was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): Where do you reside, Mr. Jenkins?

A. 3265 North Willamette Boulevard, Portland, Oregon.

Q. By whom are you employed at the present time? A. Sears, Roebuck.

Q. Have you ever been in the employment of J. C. Penney Company? A. Yes, sir.

Q. During what years?

A. Approximately, I believe, from 1926 until November of [52] 1941.

Q. Where did that employment commence?

A. La Grande, Oregon.

Q. How long were you at La Grande, at the La Grande store?

A. Five years, approximately.

Q. So that you left there approximately 1931?

A. Yes.

Q. In what capacity were you employed by that company when you left La Grande?

A. I was Assistant Manager at that time.

Q. Where did you go from La Grande, Oregon?

A. Enterprise, Oregon, as manager of the store.

Q. How long did you remain at Enterprise?

A. Approximately one year.

Q. You were manager during that entire period?

(Testimony of John S. Jenkins.)

A. Yes, sir.

Q. Where did you go after your employment ceased at Enterprise? A. Baker, Oregon.

A. In the capacity of manager?

A. Yes, sir.

Q. Did you remain at Baker until 1941?

A. November of 1941.

Q. Were you manager at Baker during that entire period? A. Yes, sir. [53]

Q. Do you recall during the year 1940, Mr. Jenkins, receiving some information concerning the profit-sharing retirement plan for the management staff of J. C. Penney Company?

Mr. Young: At this time defendants will interpose an objection to any further testimony in this case upon the same grounds as upon the motion to dismiss.

The Court: All right.

Mr. Young: May it be understood that that objection stands to each and all questions hereafter asked?

The Court: It may be so understood. Proceed.

The Witness: Well, I did receive instructions. I may answer, sir?

The Court: Oh, yes.

The Witness: I did receive instructions in regard to this plan.

Q. (By Mr. Yerke): Did you make contributions to the fund that was set up under that plan?

A. Yes, I did.

(Testimony of John S. Jenkins.)

Q. Did you make any contributions in 1940 from your 1939 compensation?

A. I am quite sure I did. I cannot answer that directly and swear that I did, but I am quite sure that I did.

Q. Then, of course, you did make a contribution in 1941? A. Yes.

Q. From your 1940 compensation? [54]

A. Yes.

Q. Did you receive a little black book outlining the details of the plan and the trust agreement?

A. Well, I did receive some information and a booklet, I remember. Of course, I cannot remember whether it was black or not. It has been a good many years ago.

Q. Do you recall what happened to that?

A. No, I do not.

(Discussion off the record.)

Q. At the time that this plan was set up and up to the time that you left the employment of J. C. Penney Company, Mr. Jenkins, had you ever been advised of any illegality in any portion of the plan or the trust agreement relating thereto?

A. No, sir.

Q. When were you first advised of any possible illegality in any portion of the plan or the trust agreement? A. Just recently.

Q. When was that? Do you mean a few days ago; a few weeks? A. Just a few days ago.

Q. Incidentally, why did you leave the employment of the J. C. Penney Company?

(Testimony of John S. Jenkins.)

A. Well, I resigned from the company because of the personalities.

Q. A personality clash? A. Yes. [55]

Q. With whom?

A. Oh, the district managers.

Mr. Yerke: Cross examine.

Cross Examination .

Q. (By Mr. Young): What was the date of your resignation?

A. It was in 1941. I can't give you the exact date or the month.

Q. Did you receive back your credits from the company at the time you left?

A. I did receive some compensation from the company.

Q. I am speaking of credits under the plan.

A. Well, the cash under the plan, yes, sir.

Q. Had it occurred to you that there was anything illegal about the plan?

A. No, not at that time. I have never been advised.

Q. You were never bothered about that, were you? A. No.

Q. And the first that you had heard of the plan being illegal began with the attorneys for Messrs. Wells and Albertsen?

A. That is the first time I had been advised that there might have been an illegality.

Q. Are you personally acquainted with either Mr. Wells or Mr. Albertsen?

(Testimony of John S. Jenkins.)

A. I had never met them before three or four days ago. [56]

Q. Who contacted you to get you to come up here to the trial?

A. One of the gentlemen of the firm called me where I am employed and asked me if I would come over and talk with them.

Q. Did they advise you the plan was illegal?

A. They advised me that they had very good information that it was.

Q. When was this that they told you?

A. I have forgotten whether it was Monday or Saturday. Saturday, I guess, last Saturday.

Q. Did you make any independent check to determine whether or not it was illegal?

A. No, sir, it was not up to me to make any check.

The Court: It would not make any difference, anyway. I am going to decide that question.

The Witness: That is correct.

Q. (By Mr. Young): Was the amount you received at the time you left the Penney Company \$783.99?

A. I cannot answer that question definitely.

Q. You do not remember the figure?

A. No, sir.

Mr. Young: That is all.

Mr. King: That is all. [57]

HARVEY L. WELLS

plaintiff, called on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): Where do you live, Mr. Wells? A. Denver, Colorado.

Q. What is your present occupation?

A. I am a general agent for the state for an insurance company.

Q. You are also one of the plaintiffs in this case; are you not? A. I am, sir.

Q. You were employed at one time by the J. C. Penney Company? A. Yes.

Q. Isn't that right? A. Yes, sir.

Q. For what period; during what years?

A. Well, it was in two periods. Originally I was employed in 1919, I believe, for a few years, and then I came back with the Penney Company in 1929, I think.

Q. Your employment during that first period, was it at Everett, Washington?

A. Everett, Washington.

Q. As a trainee; was it not? [58]

A. That is right.

Q. When you commenced re-employment—when you were re-employed by the company in 1929, where did you work, what store?

A. At Store 217 in Portland.

Q. In what capacity? A. I was a floorman.

Q. How long did you remain at the Portland store, 217?

(Testimony of Harvey L. Wells.)

A. Until about, I am not certain, 1932, 1933, I think.

Q. Where did you go from there?

A. To the management of a store, Portland store, on Williams Avenue at that time.

The Court: That is Store Number 499?

The Witness: 499; that is correct.

The Court: In 1935 you were transferred to Store Number 499. It is all set out in paragraph 16 of the admitted facts.

Mr. Yerke: We will not go ahead with that examination, then, your Honor.

Q. You left the Corvallis store in 1948?

A. That is right.

Q. You resigned? A. Yes.

Q. Why?

A. Well, I had had tragedy in my family, and many things contributed to my feeling that I had best get out. I just did [59] not feel like I would do the job.

Q. Was it a question of poor health?

A. Yes.

Q. Or mental condition, or what?

A. I just — it was health with me, and it was brought on by the loss of my wife.

Q. You made contributions, of course, to the profit-sharing retirement plan back in 1939 or 1940, did you? A. Yes, for the year 1939.

Q. You made a voluntary contribution that year?

A. Yes, sir.

Q. You continued to make contributions during

(Testimony of Harvey L. Wells.)

the other years you were in the employment of the Penney Company?

A. Yes, sir. They were withheld after the first year.

Q. At the inception of the plan and until the time that you left the employment of J. C. Penney Company, were you ever advised of any illegality in any portion of the plan or the trust agreement relating thereto?

A. No, sir.

Q. When were you first advised to that effect?

A. When I consulted Mr. King about 1950 or 1951.

Mr. Yerke: Cross examine.

Cross Examination

Q. (By Mr. Young): How did you happen to consult Mr. King? [60]

A. I had learned that Mr. Burkitt was having his contract looked over to determine whether or not he had a case, and so I felt that I should have mine.

Q. You were acquainted with Mr. Burkitt?

A. Yes, sir.

Q. Is Mr. Burkitt the one that first mentioned the subject to you?

A. Well, I don't recall. We have been friends for many years and had discussed it.

Q. Is Mr. Burkitt the one that suggested you go to see Mr. King?

A. Yes, sir.

Q. At the time that you left the Penney Company, did you receive back all of your own contributions?

A. Yes, sir.

(Testimony of Harvey L. Wells.)

Q. Did you also receive the company contributions and the other credits to which you would be entitled under the plan? A. Yes, sir.

Q. What age were you when you left the Penney Company? A. I believe 1951.

Mr. Young: If the Court please, if there is any further cross examination, we reserve it, I assume, until tomorrow morning.

The Court: Yes. I was going to ask, is the issue of whether or not this is a representative action, whether Mr. [61] Wells and Mr. Albertsen represent all of the other persons who have left the employ of the company and who made original contributions, one of fact or of law?

Mr. Young: One of fact.

Mr. Yerke: I think it is one of your contentions of law; is it not?

The Court: I noticed it is the defendants' contention of law.

Mr. Stone: Yes, contention of law number six.

The Court: Contention of law number six appearing at page 78 of the pre-trial order, and it is again referred to on page 91, number 22 and 23.

Mr. Yerke: Did you have any further questions now, Mr. Young?

Mr. Young: Just one moment, please.

Mr. King: Well, the purpose of putting this testimony on, if that is what you would like to be advised, is that we have alleged in here that the plaintiff was not advised of any illegality of the plan until shortly prior to the institution of the action,

(Testimony of Harvey L. Wells.)

and Mr. Young is denying that. That is the primary purpose of these witnesses.

The Court: I did not know.

Mr. King: That is the issue that we are called upon to meet.

Mr. Young: That is what we assumed the witness was [62] confining his testimony to, your Honor.

The Court: I have not interposed any objection. I just asked you a question, Mr. Young.

Mr. King: Well, I thought that that matter might be of assistance to the Court. That is the issue that we recall.

The Court: There was no issue of fact made on the representative character of this action?

Mr. King: I do not think so.

The Court: You agree that that is a question of law as to whether or not these men represent all the other people in the plan? I do not think that it is necessary for the plaintiffs to show that they represented everybody of the class.

Mr. King: No, we have not the information and could not get it from the company as to the names of these people. I endeavored to get it from them in New York so we could communicate with them. On their motion on jurisdiction, they say they will submit the names if the Court orders them to do so, but we have not communicated with any of them except Mr. Jenkins. We located him.

Mr. Young: Counsel's statement just now is that they have not communicated with these persons whom they purport to represent. Under those cir-

(Testimony of Harvey L. Wells.)

cumstances, I take it the matter is solely a question of law, and our contentions of law so state. [63]

Mr. King: Well, the point is that we have communicated with Mr. Jenkins and we have had—there is a Mr. Mitchell who is due to arrive at two-thirty this afternoon. We have communicated with him, but we cannot communicate with people the names of whom we do not know.

Mr. Young: That, of course, is a ridiculous statement because there is machinery in this court to get the names of anyone. The point I wish to make in answering your Honor's question is that counsel has stated that they have not notified anyone with the exception of those men Jenkins and Mitchell, and I am stating to your Honor on the basis of those facts it then is simply a question of law as to whether these people represent the parties they purport to represent.

Mr. King: Well, I think in view of counsel's statement, we would like to offer, in addition to the other exhibits, we would like to offer the original complaint in this action as an exhibit also because at that time it was commenced as a class action. There has been no question raised on the subject.

Mr. Young: Well, I object to the matter being—the complaint being introduced at this time for the reason that the issues set forth in the pre-trial order displace the complaint, in any event.

Mr. Yerke: An issue of fact?

The Court: It could be admitted as an admission against [64] interest.

(Testimony of Harvey L. Wells.)

Mr. King: It is in the agreed statement of facts. I did not know he was making an issue of fact until now. I have never heard about it.

Mr. Young: We can shorten this discussion, perhaps. In the complaint it was alleged that Wells and Albertsen represented the past participants. That allegation was denied in the answer. Now, that denial has stood ever since, and it still stands in the pre-trial order.

The Court: Well, as a matter of proof, is there anything that the plaintiff has to do in order to establish the fact that this is a class action?

Mr. King: I do not see how when he alleges in his complaint and that they bring it on behalf of themselves. That is the federal forms that are supplied. They filed the original complaint in that matter. That is the way they proceeded ever since in this action. He could ask them if they ever brought it individually, if he wants to, to ask the question.

Mr. Young: Counsel speaks as though somebody other than himself brought this complaint. Mr. King is the one that brought this complaint.

Mr. King: Yes, and I am not ashamed of it.

Mr. Young: No, I know, but I am just stating a fact.

Mr. King: I claim credit for filing it.

Mr. Young: All right, all right, you claim credit for it.

Mr. King: Yes, I do.

Mr. Young: The question now is this issue as to whether or not the plaintiffs Albertsen and Wells

(Testimony of Harvey L. Wells.)

represent past participants, and I am stating to your Honor under the denial in our contentions of law set forth in the pre-trial order we raise an issue upon that point.

Mr. King: Where is your contention of fact, is what we are talking about. We know you deny it as a question of law, but where is your contention of fact? You signed this pre-trial order. Where did you raise the contention of fact on that?

Mr. Young: The question is as to whether or not these people represent past participants as a question of law, your Honor, and it is now an agreed statement in this case that the past participants were not, in fact, notified with the possible exception of this man Jenkins, and that there is another man by the name of Matthews coming in.

Mr. King: Mitchell.

Mr. Young: Mitchell, pardon me. I might ask opposing counsel whether he asked anybody to join with him in this action who did not join.

Mr. King: I can answer that I did not.

Mr. Young: If the Court please, I might call your Honor's attention to one other point. There is a stipulation in the beginning of the contentions and issues, there is this [66] stipulation: "It is agreed by all parties that the classification of the contentions and issues which follows hereafter as being contentions or issues of law or fact is intended for the convenience of the Court and parties, and such classification shall not prejudice any rights of the parties." I point to that particular

(Testimony of Harvey L. Wells.)

stipulation. If there is an argument as to whether or not a particular contention is technically one of law or of fact, the circumstance that it has been designated as one of law does not prejudice the rights of the party so designating it. It could be considered also as a contention of fact.

The Court: Anyone can make his records the way he wants.

Mr. King, if you think it is necessary to do anything else, go ahead and do it. The same is true of Mr. Young. Are you through with the cross examination, or do you want to interrogate Mr. Wells any further?

Mr. Young: No, I am through. Pardon me, if the Court please, I requested a few moments ago the privilege of recalling Mr. Wells to the stand in the morning.

The Court: All right, Mr. Wells will remain.

Mr. King: Just a minute. We might ask a few more questions, and we will let him go now.

The Court: Yes. [67]

Redirect Examination

Q. (By Mr. King): Mr. Wells, were you acquainted with me before you came to see me about this matter? A. Very well.

The Court: I am really not interested in how he happened to come to you.

Mr. King: Well, there may be some point here. It might become a question of law under the pre-trial order here.

(Testimony of Harvey L. Wells.)

Q. Mr. Wells, did you institute this action, you and Mr. Albertsen, solely for the benefit of yourselves, or for yourselves and those in a similar situation?

A. It would be for ourselves and those in a similar situation because it is the plan, but it is not us individually.

Mr. King: That is all.

Recross Examination

Q. (By Mr. Young): Mr. Wells, were you ever authorized by any other past participants in the plan to represent them in this case.

A. No, sir.

Mr. Young: That is all.

Mr. King: That is all. [68]

HARRY J. ALBERTSEN

plaintiff, called in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): Where do you presently reside, Mr. Albertsen?

A. I live at Long Pine, Nebraska.

Q. How long have you lived there?

A. Three and a half months.

Q. Is that your permanent residence?

A. Well, I would say temporarily.

Q. You are actually a resident of California, are you not?

A. That is right.

(Testimony of Harry J. Albertsen.)

Q. Why have you been staying at Long Pine?

A. Well, I went there for my health.

Q. I believe it is a stipulated fact in the case that you left the employment of J. C. Penney Company in 1951; that is correct, isn't it, December 31, 1950?

A. December 30, 1950, although—

Q. You were actually on the job on January 2, 1951, though; were you not?

A. Yes, sir, I was.

Q. You were a manager, were you not, at the time that the profit-sharing plan was put into effect in 1940?

A. Yes, sir, I was. [69]

Q. You did not make a contribution, however, did you, out of your 1939 earnings in 1940?

A. No, sir, I did not.

Q. Did you make a contribution for each year thereafter until you ceased being employed by J. C. Penney Company?

A. Yes, sir, I did.

Q. At the inception of the profit-sharing retirement plan and until you left the employment of J. C. Penney Company, had you ever been advised of any illegality in any portion of the plan or the trust agreement?

A. No, I cannot say that I did.

Q. When were you first so advised?

A. Well, after I left the Penney Company.

Q. Could you recall when the knowledge first came to your attention?

A. Well, in the early part of 1951.

Mr. Yerke: Cross examine.

(Testimony of Harry J. Albertsen.)

Cross Examination

Q. (By Mr. Young): How did that come to your attention?

A. Well, I called Jerry Geisler of Los Angeles.

Q. You what?

A. I called Jerry Geisler.

Q. Who is he?

A. He is an attorney down in Los Angeles. [70]

Q. Oh, the criminal lawyer down in Los Angeles? A. Yes.

Q. How did you happen to call him about it?

A. I wanted to know.

Q. Had Mr. Burkitt spoken to you about it?

A. No, sir.

Q. Do you know Mr. Burkitt?

A. I know Mr. Burkitt.

Q. Had Mr. Wells spoken to you about it?

A. No, sir.

Q. You inquired on your own initiative, then?

A. Yes, sir.

Q. Were you ever authorized by anyone in the retirement plan to represent them in this particular action? A. No, sir.

Q. At the time that you left the Penney Company, did you receive all of your contributions in the plan? A. I did.

Q. Did you receive also the company's contributions and the other credits to which you were entitled? A. Yes, sir.

Mr. Young: If the Court please, we reserve

(Testimony of Harry J. Albertsen.)

the right to ask Mr. Albertsen further questions in the morning.

Mr. King: I would like to ask him a few on what has been testified on the cross examination.

Redirect Examination

Q. (By Mr. King): At or about the time that you contacted Mr. Geisler, did you receive any information with respect to the institution of an action by Mr. Burkitt? A. No, sir.

Q. Did you learn Mr. Burkitt had filed a case against the Penney Company?

A. Well, not before I——

Q. No, I say after you talked to Mr. Geisler.

A. Yes, after.

Q. How did you learn of it?

A. It came in over the air, on my radio.

Q. Did you make any effort to ascertain what attorney had represented Mr. Burkitt?

A. I did.

Q. As a result of that effort, did you contact me? A. I did, sir.

Q. Did you have an interview with me in Los Angeles? A. Yes, sir.

Q. And that was prior to the institution of this action of you and Mr. Wells? A. Yes.

Mr. King: That is all the questions I have.

Mr. Young: No further questions at this time, your Honor. [72]

The Court: All right, will you please return tomorrow morning at ten o'clock.

Mr. King: Your Honor, we have one more witness, Mr. Robert H. Mitchell, who is due to arrive here by plane this afternoon, but he is not here yet, and we wondered if we could call him tomorrow morning?

The Court: You may if you want, or we can take a recess.

Mr. King: I have a man meeting him at the airport.

Mr. Young: Why not let it go until tomorrow morning, your Honor? It is satisfactory with us.

The Court: Do you know what evidence you are going to put on?

Mr. Young: We will know about it tomorrow morning, your Honor, for sure.

The Court: Is there any witness you could put on this afternoon?

Mr. Young: No, I am not prepared to put on a witness this afternoon, your Honor. I think our testimony, if any, will be very short, and, as I view this case, it is largely a question of law.

The Court: I understand Mr. King is going to make a statement tomorrow on the basis of his statement. He is going to have some experts testify as to the reasonable value of his fees.

Mr. Young: Your Honor calls it a statement. Do I understand [73] it is not going to be under oath?

Mr. King: No, it is going to be under oath. If you want to, you can have an additional one.

Mr. Young: I just was not familiar with the term "statement."

The Court: We will recess.

(Thereupon, the trial was recessed to Thursday, June 24, at 10:00 a.m.) [74]

Morning Session

(Thursday, June 24, 1954, 10:15 a.m., trial resumed pursuant to recess.)

The Court: Mr. King, you had a statement?

Mr. Young: If the Court please, before proceeding, I would like to call the Court's attention to a circumstance in accordance with your Honor's suggestion, and you note I call it suggestion rather than order.

We, this morning, served upon Mr. King a document which consists of a list of exhibits which were offered in evidence by the plaintiffs on June 23, together with a list of those that are objected to by the defendants. We have set forth in connection with these exhibits offered by the plaintiffs the objections which we have to certain of them. In addition, as I have stated, we have submitted a list of exhibits which we offer in evidence, and we will be glad to hear from opposing counsel if there is any question with respect to those.

Furthermore, I have submitted a list of paragraphs in the pre-trial order which are objected to by the defendants. That is in accordance with the right given us in the stipulation in connection with the statement of agreed facts, and these three documents——

The Court: After you have agreed to certain facts, are you now objecting to some of them?

Mr. Young: The stipulation, your Honor will recall that [75] in respect to the statement of agreed facts, the facts as facts are agreed to, but the right was reserved to both parties to make any objections to the relevancy or materiality of any portions. That is the point, your Honor.

I would like to hand up this statement at this time to be filed with the record of the case.

Mr. King: We will check it as soon as we can, but I would like to go ahead with this phase of it.

The Court: All right. Then I will not make any ruling on the admissibility of the evidence until after I have had an opportunity to examine this list.

Mr. King: That is right.

Mr. Young: If the Court please, before Mr. King proceeds, I should like to submit a statement to the Court of our position with respect to the matter of attorney's fees.

The 14th contention of fact submitted by the plaintiffs reads as follows:

"Plaintiffs contend that 4 per cent of the value of the shares of stock of J. C. Penney Company which are found by the Court to have been acquired by the Trustee by the use of the contributions and earnings of the plaintiffs and those for whom plaintiffs prosecute this action is the reasonable value of the services of plaintiffs' attorneys in instituting and prosecuting this action." [76]

That contention is denied by the defendants.

Plaintiffs' contention of law number 11 reads as follows:

“Plaintiffs further contend that a decree should be entered herein adjudging and decreeing that the Trustee holds the shares of stock of J. C. Penney Company under a resulting trust in favor of the plaintiffs and those for whom plaintiffs prosecute this action and all other participants who did not attain retirement status in that proportion which the contributions and earnings of each such person bears to the total contributions and earnings of all such persons used in the acquisition of and payment for said shares of stock.”

That contention is denied.

And, finally, plaintiffs contend in their paragraph 13 of their contentions of law that:

“ * * * plaintiffs are entitled to a decree awarding plaintiffs compensation for the reasonable value of the services of their attorneys in the prosecution of this action, and for their costs and disbursements incurred herein, and further decreeing that the sums so awarded shall constitute a lien upon all the shares of stock found by the Court to have been acquired by the contributions and earnings of the plaintiffs and those for whom they prosecute this action.”

This contention is denied by the defendants.

Your Honor will observe that by virtue of the plaintiffs' contention of law number 11, that if the Court should decide [77] this case in favor of the plaintiffs, the relief they are seeking is that there shall be a resulting trust in favor of those individuals whom your Honor has now identified as being those participants in the plan in the years

1940 and 1941, some of whom are in the class of past participants, some of whom are in the class of present participants.

The point that we are making at this time is that the decree with respect to attorney's fees is one which calls for a lien to be imposed upon the shares of stock which would be awarded to those who are in the field of past participants, together with a resulting trust in favor of the present participants, all of whom were in the plan in 1940 and 1941. The effect of such a decree, if entered, would mean that those individuals are declared to be the owners of the stock in question. Since that is the contention which is made in this case, it is obvious that in the event that this case ever reached the stage of attorney's fees, the Court would be dealing with stock which it has determined is the stock of the participants. Under those circumstances, it is the position of both defendants in this case that we are not interested in this particular phase of the matter, that in truth and in fact the adversary controversy in respect to that subject is one between the law firm of which Mr. King is head and of the participants whom he claims are entitled to receive the stock.

The Court: Your objection will be noted. [78]

Mr. Young: And our silence hereafter during the course of this, I assume, will also be noted?

The Court: You do not have to make any further objections to the testimony.

RALPH H. KING

called, having been first duly sworn, testified as follows:

Mr. King: My name is Ralph H. King. I am a partner in the firm of King, Miller, Anderson, Nash and Yerke. I have practiced law in the City of Portland for in excess of 33 years. I have had at least 15 or more years of practice largely limited to corporate matters and transactions, reorganizations and other matters involving extensive corporate transactions.

About the first of December, 1949, I was consulted by Mr. Harvey L. Wells with respect to his rights, if any, to shares of stock held by the Trustee of the plan involved in this action. As a result of that conference, I commenced an intensive investigation, both of law and the study of retirement plans, to determine what, if any, rights Mr. Wells might have to any shares of stock.

This investigation continued from time to time throughout the year 1950 and was still in progress in the early part of 1951.

About the end of March, 1951, I received a long distance call from Mr. Harry J. Albertsen, one of the plaintiffs in this action, in which he desired a consultation with respect to his rights under the plan. As a result of that, while in Los Angeles on other business, I had a conference with Mr. Albertsen. As a result of the investigation of law and of study of retirement plans, I advised those two gentlemen that [80] their rights, if any were to be

(Testimony of Ralph H. King.)

presented, were rights in common to both and that they should be presented, if at all presented, as an act in their own behalf and on behalf of others who were similarly situated, and they both consented to institute an action upon that basis. As a result of that, the present action was commenced on July 11, 1951, and has been pending in this court since that date.

It soon became apparent that it would be necessary to obtain various information for this case from the files of the company and that that could only be done by depositions taken under the provisions of the Federal Rules of Civil Procedure and preparations were made and such depositions were taken in the City of New York, commencing on the 29th day of October, 1951, and extending through the 7th day of November, 1951.

In order to arrange for the numerous subpoenas duces tecum which were required to require the production of records, it was necessary to be in New York at least a week prior to the commencement of depositions, and it was necessary to make quite a lot of preparations and arrangements for the taking of such depositions and the proper examination of witnesses thereat.

Following that, the defendants took depositions over five or six days in the month of March, 1952.

This case has required a number of routine appearances in court from time to time with respect to reporting the progress [80a] in the case. We had one day's argument on the question of juris-

(Testimony of Ralph H. King.)

diction, and it is expected that in addition to the work performed up to the time of the commencement of this trial, approximately one month's work will be required in preparing and submitting briefs to the trial court.

Up to the time of the commencement of this trial, I myself had devoted 620 hours to this case. Mr. Borden Wood, a then partner in the firm, devoted 3 hours and 35 minutes, Mr. Grant Anderson, a partner in the firm, 86 hours and 10 minutes; Mr. Frank Nash, a partner in the firm, 6 hours and 30 minutes; Mr. Fredric Yerke, a partner in the firm, 165 hours. In addition to that, services of associates were devoted to the preparation of law and other matters as follows: Mr. Norman J. Wiener, 15 minutes; Mr. John W. Hill, 1 hour and 25 minutes; Mr. Curtis W. Cutsforth, 106 hours and 20 minutes; Mr. George H. Brustad, 1 hour and 50 minutes; Mr. Eric R. Haessler, 178 hours and 35 minutes; Mr. H. F. Althaus, 6 hours and 20 minutes; Mr. Paul R. Meyer, 160 hours; Mr. Gerald J. Norville, a former associate, 16 hours; Mr. Ferris F. Boothe, a former associate, 33 hours and 20 minutes; Mr. David P. Templeton, a former associate, 116 hours and 30 minutes.

I want to say in addition to that, that in order to prepare the complaint in this case, it required a very intensive study of the law of trusts, the law of pension plans, review of all known and obtainable pension plans, and the application of [81] the rules of lotteries as established with various types

(Testimony of Ralph H. King.)

of commercial arrangements, and then applying those rules to the present situation.

I think that covers in general the type and character of services. I take it there is no cross examination, Mr. Young?

The Court: Do you want to state what in your opinion would be a reasonable fee to be allowed?

Mr. King: It is impossible to determine exactly the amount of stock. In other words, we are making no claim except with respect to the shares of stock that are obtained for plaintiffs and those for whom they prosecute the action, namely, the former participants in the plan who were in the plan in the years 1940 and 1941 and who never attained a retirement status.

As near as I can compute it, and assuming that the amount as approximately recovered is \$16,000,000, it was my opinion four per cent of that sum was a reasonable amount.

The Court: \$640,000?

Mr. King: Yes, sir, and in so stating that, I want to say that the fee in this character of a case is essentially contingent in character, and I want to say in addition that I have not the exact figures available, but the disbursements up to the present date are somewhere between three and four thousand dollars.

The Court: You say the amount involved would be sixteen [82] million dollars?

Mr. King: I say that is the only estimate I can make. They have never declared the figures, but

(Testimony of Ralph H. King.)

I may say if the amount was less than that, I would ask four per cent. If it turned out to be twelve million, it would only be \$480,000. I do not want the six hundred forty thousand unless the recovery is sixteen million or more.

The Court: I understand there was 200,000 shares, a three for one split, and that would mean around 600,000, I think, selling on the market at eighty-seven, so it would be over \$50,000,000.

Mr. King: Well, I know, your Honor, but there is a portion of all the participants we do not represent, and I assume that is about half, and I have made no claim. Instead of using the present market, I have a figure at the time they got the stock annuity. It might not be eighty-seven, a figure **which** would be below. For those we do not represent, it would be over half of them, we are making no claim on that and make no lien upon their shares although they finally benefit from the litigation.

The Court: Any further questions?

Mr. Young: No.

The Court: That is all. [83]

NICHOLAS JAUREGUY

called, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. King): Mr. Jaureguy, you are engaged in the practice in the City of Portland?

A. Yes, I am.

(Testimony of Nicholas Jaureguy.)

The Court: Mr. Jaureguy's qualifications are not in doubt, are they, Mr. Young?

Mr. Young: I have no objection, your Honor, but I am not participating in this part of the proceeding.

Mr. King: He says, your Honor, that he will not have anything to do with it, and I would not ask the questions otherwise.

The Court: Then am I supposed to represent the participants of the plan?

(Discussion off the record.)

Mr. Young: As far as I know, they are not represented, your Honor. I suspect they are not represented.

The Court: I will handle that myself.

Mr. King: Q. Just briefly, you have been engaged in the practice here over thirty years, I take it? A. That is correct; yes, sir.

Q. And you are presently a member of what firm? A. Cake, Jaureguy and Hardy. [84]

Q. Have you had occasion to examine the pre-trial order and the pleadings in the present action?

A. Yes.

Q. Have you heard the statement of Mr. King while he was on the stand? A. That is right.

Q. Have you been able to form any opinion as to what sum should be awarded for the service of the plaintiffs' attorneys in the present action?

A. Before expressing an opinion, I would like to discuss one point that I think is involved, but I am not sure. I think it has some bearing on it, and

(Testimony of Nicholas Jaureguy.)

inasmuch as there is nobody appearing on the other side, I would like to explore that matter.

That is, as I view this case, there are two contingencies, well, three. One is that you will not get anything. I do not discuss that.

Q. We are conscious of that.

Mr. Young: We would agree to put that contingency in the statement of agreed facts, your Honor.

The Witness: Then, of course, there are two problems in this case that, while I am not an expert on either and I have had no experience at all on one and very little on the other, two very perplexing problems that might result in either one or another type of decree.

One is that the Court may find that you are correct in [85] your contentions with respect to a type of annuity and retirement provisions, that it is a lottery and things of that kind, and, therefore, that you are entitled to recover. He may hold against you on the class action feature of it, and in that case I am assuming for purposes of my testimony that you will get some fees and get a fee from the named plaintiffs who recover in this case, and then the other contingency is that the Court will find for you on both points, and in that case, that is the fee that I am testifying about because the other one is not before the Court; nevertheless, I think it is something that should be considered.

Mr. King: I want, if I may interrupt, to make a statement in that case. I have no contract with the plaintiffs to that effect, that there shall be a fee.

(Testimony of Nicholas Jaureguy.)

There is no contractual arrangement of any character. I want to make that a part of my statement.

The Witness: Well, I am assuming also there is no contractual arrangement to the contrary that you will not be paid by them if you recover. In other words, there is no contract.

Q. There is just no contract.

A. I dislike to argue with an attorney that calls me as a witness, but I just want the Court to understand that I am going on the assumption the Court takes that into consideration. With that understanding, with that background, based on your testimony and a study of the pre-trial order, I would say [86] that if the Court finds in favor of the plaintiffs in this case on the basis—and that you recover for the unnamed plaintiffs, those that are members of the class as well as the named plaintiffs, I would say that if the total amount involved is ten million dollars, I would fix a fee—or I would testify that, in my opinion, a reasonable fee would be \$200,000 plus one per cent of the amount involved in excess of ten million dollars.

Mr. King: No further questions.

Th Court: I see that Mr. Manley Strayer, Mr. Walter Evans, and Mr. Moe Tonkon are in the courtroom. I think the record should show that instead of having to qualify each of the attorneys, they are well-known, capable lawyers who have had a great deal of experience, and they are among the distinguished members of this bar.

Mr. King: Thank you, Mr. Jaureguy.
I will call Mr. Manley Strayer. [87]

MANLEY B. STRAYER

called, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. King): Mr. Strayer, have you had an opportunity to examine the pre-trial order and the pleadings in this action? A. Yes, I have.

Q. You have heard the testimony of Mr. King while on the stand? A. I did.

Q. What, in your opinion, would be a reasonable sum to be allowed for the services of attorneys for plaintiffs in the present action in the event that they prevailed on behalf of all members of the class?

A. Like Mr. Jaureguy, I make the assumption that recovery is allowed in approximately sixteen million dollars and that the attorney fee is to be spread over the fund that is recovered, and on that assumption it is my opinion that a reasonable fee would be two per cent of the amount recovered.

Mr. King: Thank you very much. [88]

MOE M. TONKON

called, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. King): Mr. Tonkon, have you had an opportunity to examine the pre-trial order and the pleadings in this action? A. I have.

(Testimony of Moe M. Tonkon.)

Q. Did you hear the statement of Mr. King with respect to the nature and character of the services?

A. I have.

Q. Assuming that the plaintiffs prevail in behalf of themselves and the other members of the class, what, in your opinion, would be a reasonable sum to be allowed by the Court for their services as plaintiffs' attorneys in this action?

A. I think the amount prayed for in the plaintiffs' complaint by the plaintiffs themselves is reasonable; in other words, four per cent of the recovery made.

Mr. King: Thank you very much. [89]

WALTER H. EVANS, JR.

called, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. King): Mr. Evans, have you had an opportunity to examine the pre-trial order and the pleadings in this action?

A. I have before, and I examined them briefly.

Q. You have heard the statement of Mr. King with respect to the nature and character of the services?

A. I have.

Q. Assuming that the plaintiffs prevail on behalf of themselves and of other members of the class which they represent in this action, what, in your opinion, would be the reasonable fee to be allowed for the plaintiffs for the service of their attorneys in this action?

A. In my opinion, the only—I should not say

(Testimony of Walter H. Evans, Jr.)

the only—the fairest way to fix the fee in a class suit such as this is on a percentage basis. In my opinion, a reasonable attorney's fee to be allowed successful counsel in a class suit of this nature would be in the range from five to ten per cent of the amount of recovery. If I had to pinpoint, I would take the middle figure, seven and a half per cent. I think the precise percentage figure depends upon the difficulty of the case, the questions of law involved, the amount of the recovery, the likelihood of appeal. I am basing that on the assumption that you [90] meant exactly what you said when you said you had no contract with the named plaintiffs for your compensation except probably by contingent; that you may be able and probably will recover your actual out-of-pocket expenses from the named plaintiffs.

Mr. King: Thank you very much. [91]

ROBERT H. MITCHELL

a witness produced in behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Yerke): Your name is Robert H. Mitchell? A. That is right.

Q. Where do you live, Mr. Mitchell?

A. At Glendale, California.

Q. By whom are you presently employed?

A. By Menasco Manufacturing Company, Burbank, California.

(Testimony of Robert H. Mitchell.)

Q. Have you ever been employed by J. C. Penney Company? A. I have.

Q. For what period?

A. From the first of September, 1923, until the last of January, 1947.

Q. When did you first become a manager of a J. C. Penney store?

A. Approximately January 15, 1929.

Q. What store was that?

A. That was at Calexico, California.

Q. How long did you remain at Calexico?

A. Until May 30, 1933.

Q. When you left Calexico, were you still manager of that store? A. Yes. [92]

Q. Where did you go from there?

A. Redlands, California.

Q. You were manager? A. Yes.

Q. How long did you remain at Redlands?

A. Until January 31, 1940.

Q. Were you a manager of the Redlands store at the time you left Redlands? A. I was.

Q. Where did you go from Redlands?

A. Flagstaff, Arizona.

Q. Did you go as manager? A. I did.

Q. How long did you remain at Flagstaff?

A. For seven full years, January 31, 1947.

Q. That is when you left the employment of J. C. Penney Company; is that right? A. I did.

Q. Why did you leave the employment of that company?

A. I had asked for a transfer because of the

(Testimony of Robert H. Mitchell.)

health of my wife and son who could not stand the seven thousand altitude there, and I received a letter from the Personnel Department of the J. C. Penney Company that because of my past record and the fact that I had not beaten my 1942 volume in the year of 1946, that I was not entitled to a [93] transfer.

Q. And you subsequently resigned?

A. The letter stated that if I really thought I should leave Flagstaff, that it would be best for me to resign, and I resigned.

Q. You were a J. C. Penney manager, then, during the year 1940? A. I was.

Q. Do you remember the inception of the profit-sharing retirement plan of the J. C. Penney Company? A. Yes, I do.

Q. Did you make a contribution in 1940 to that plan out of your 1939 earnings?

A. The one that was not mandatory?

Q. That is right.

A. I did.

Q. Did you continue to make contributions, then, for each year thereafter until the time you left the employment of J. C. Penney Company?

A. I did.

Q. At the time that you first contributed to the fund that was set up under the plan and trust agreement until the time that you left the employment of the J. C. Penney Company, were you ever advised by anyone of any illegality in any portion of the plan or trust agreement relating thereto?

(Testimony of Robert H. Mitchell.)

A. No.

Q. When did you first learn of such illegality?

A. In the summer of 1941 in talking with my friend, Mr. Albertsen.

Q. Do you mean 1941 or 1951?

A. Of 1951; I am sorry.

Q. 1951?

A. 1951, talking with my friend, Mr. Albertsen, he informed me that a suit had been instituted attacking the profit-sharing plan of J. C. Penney Company in regard to the stock part of that plan, that it was illegal and constituted a lottery.

Q. That was the first information you had received on the subject? A. The very first.

Mr. Yerke: That is all.

Cross Examination

Q. (By Mr. Young): At the time you left Penney Company, did you receive all of the credits that you were entitled to under the plan?

A. As far as the cash is concerned, I did.

Q. You left the company before reaching retirement age; did you not?

A. About eight years before.

Mr. King: Just a minute, I do not understand what is retirement age. Did you mean 60 years retirement age?

Mr. Young: Q. How old were you at the time you left the Company? [95]

A. I was not quite 52.

Mr. King: That is what I wanted to find out. I did not know how old you were.

Mr. Young: That is all.

Mr. King: That is all.

Your Honor, if we could have a few minutes we could go over these exhibits, and I think that is our case. We would like to check them.

The Court: We will take a recess.

(Recess taken.)

Mr. King: If your Honor please, in view of the objections served on us by counsel just before court took up this morning, we withdraw from our list of exhibits Exhibit 23 and Exhibits 159 and 160, but we would like to add to our list of exhibits 319 and 320. 318 is the complaint in this case, and 319 is the answer of one defendant, and 320 is the answer of the other, which were going to be offered by the other side anyway.

Mr. Young: There is no objection to 319 and 320, your Honor.

The Court: Then the only exhibits to which you object are 140 and 141; is that right, now?

Mr. Young: That is right.

The Court: And 208-A through D and 222-A through D and 329 through 334?

Mr. Young: That is right, your Honor.

The Court: All of the other exhibits listed on page 1 of Mr. Young's [96] statement and the first 7 exhibits listed on page 2 are admitted, and the other exhibits offered by plaintiff are admitted provisionally.

Mr. King: Thank you, your Honor.

The Court: Now, with reference to the exhibits of defendant to which——

Mr. King: We will make a statement on that as soon as they offer them, your Honor, but I thought you wanted to know whether we rest or not.

The Court: Plaintiffs rest.

Mr. King: They made some kind of a reservation about our depositions, and I would like to have that cleared up, and then we are ready to rest.

The Court: The portions of the exhibits read into evidence are admitted.

Mr. King: The plaintiff rests.

The Court: Mr. Young, do you now want to offer the exhibits listed in the statement you presented this morning?

Mr. Young: Yes, your Honor, in fact, the statement itself makes the offer.

Mr. King: Very well, your Honor, we will say that we have no objections except for the ones I am about to mention, which are objected to on the grounds that they are irrelevant and immaterial. Number 12, number 128, the same objection that counsel made to some of ours. It is set forth [97] in extenso on page three and a half in the pre-trial order. There would seem to be no purpose in putting it into the record again.

Mr. Young: Pardon me, your Honor. We are willing to withdraw Exhibit 128.

Mr. King: Thank you.

I proceed down the list of exhibits to 174 and 175. Those are letters of Mr. Burkitt, and we ob-

ject to them as being only irrelevant and immaterial in the present action.

Mr. Young: Well, they are the letters showing why Mr. Burkitt left the company, and for that reason we regard them as material.

The Court: It may be material in the Burkitt case, but how would it be material in this case? I am leaving it up to you, as you know. If you want to keep them there, I will let them in provisionally.

Mr. Young: Yes, I understand. If the Court please, Mr. Burkitt, although he has brought a separate action which was tried previously, happens to be a person who falls within the classification of parties on whose behalf the plaintiffs purport to act.

Mr. King: Well, that is admitted provisionally, then, your Honor.

The Court: Yes, it will be. That is what my ruling is going to be.

Mr. King: We have Exhibits 194 thru 204 which are a similar [98] correspondence of plaintiff Albertsen as to the settlement of his accounts and why he left the company. It was immaterial also. I mean, that is not an issue in this case. He stated on the stand he got all the settlement he is entitled to other than the stock, so I do not see how that adds anything to it.

The Court: Do you want to withdraw that, Mr. Young, or do you want to keep that in?

Mr. Young: When Mr. Albertsen was on the witness stand and was examined by Mr. King, he testified to a separation, and, therefore, we would

like to have the correspondence dealing with that subject in the case.

The Court: All right.

Mr. King: Well, it is set forth in the pre-trial order, too, that he was discharged.

The Court: I do not think that an appeal will require the printing of all these exhibits. If the losing party desires, I will enter an order permitting the mailing of all exhibits to the clerk without having to print them.

Mr. King: That was one of the things I had in mind.

The Court: Well, I appreciate that.

Mr. King: All right, thank you.

The Court: But I would not require that. There are too many exhibits here.

Mr. King: We make the same comment and objection with respect to 205 and 215-A through H; the Wells [99] correspondence, 233 thru 243. They are matters pertaining to the settlement of accounts and also further correspondence with Wells, 245 through 254-H. Burkitt has a letter, Exhibit 260, and this pamphlet relating to annuities, 280 and 282-A through J, they are just statements of account. They are all between Albertsen and Wells. I mean, there is no issue in the case. In fact, it is stated in the pre-trial order.

Those are our objections to that.

Now, 303 relates to Burkitt, the summons and complaint in the Burkitt case, and 304 and 305 are the answers of the two defendants.

Mr. Young: I have stated our position in regard to those, your Honor.

Mr. King: 309 is a group of annuity contracts with insurance companies. There is no issue about them in this case. I think they are immaterial.

Now, we come down to 313 and 315, the statements about benefits paid or something. They are not in issue here also.

We come to 317. It is Albertsen's record of payments into the fund which is set out in the pre-trial order, about paragraph 52 or 57—72, or something like that.

323 is various stipulations. It is covered in the pre-trial order also. 324 is the same thing. In other words, those are incorporated, and the point I had in mind is I do not regard them as injurious, but it just clutters up the record. [100]

The Court: Mr. King, I agree with much of what you have said, and I agree with much of what Mr. Young said with reference to relevancy of some of the exhibits which you have offered, but I have permitted each of you to determine what exhibits you want to offer, and I am going to admit all of the exhibits offered by Mr. Young to which no objections have been made, and the other exhibits you offered to which there have been objections I am going to admit provisionally.

Mr. King: I want to say I think, your Honor, that the matter of transmitting them to the Court will cover most of what I had in mind, and I thank your Honor for the statement.

Mr. Young: There will be no trouble about

transmittal to the Court of any documents, I assure your Honor.

The Court: Mr. King was concerned about the possibility of having to print each of the exhibits.

Mr. Young: Yes, I understand.

The Court: That would be a very costly procedure.

Mr. King: That is right, and some of these are tremendous documents and I would hate to have to take whole volumes and print them.

Mr. Young: Yes.

The Court: Mr. Young, do you desire to offer any live witnesses?

Mr. Young: Yes, your Honor.

The Court: Proceed. [101]

Mr. Young: Before proceeding to offer the live witnesses, however, I wish to move the Court at this time for an order dismissing this proceeding upon the same grounds that were assigned at the opening of the case.

The Court: I will take it under advisement.

Mr. Young: I call your Honor's attention to the fact that in the document that was served upon opposing counsel this morning, the last page of which sets forth the paragraphs in the pre-trial order which were objected to by the defendants, your Honor did not comment upon that matter.

The Court: I did not see them. I will take that one under advisement.

Mr. Young: Very well, your Honor. Shall I proceed now?

The Court: Yes. I wondered if there should be

some record here of that. Is there any objection if the document prepared by Mr. Young this morning is admitted in evidence, any objection to the admission of that statement into evidence?

Mr. Young: I requested that it be filed with the records of the case, your Honor.

Mr. King: It is the third sheet of the document referred to?

Mr. Young: It is the last sheet.

Mr. King: Yes, I have no objection to it being marked for purposes of identification so we will know what we are talking about. The next number is 335.

The Court: Mark it 335. It is admitted as [102] showing the action of the parties.

(Document referred to marked Defendants' Exhibit 335 and received in evidence.)

Mr. Young: If the Court please, plaintiff's counsel offered in the record a portion of the Weiderman deposition found at page 257 and running over through the first line on page 258. At this time I would like to ask that there be added to the portion which counsel asked to have made part of the record, the balance of page 258 of the Weiderman deposition.

Mr. King: There is no objection.

The Court: It may be admitted.

Mr. Young: At this time I ask that there be considered as being placed in the record of this case that portion of Mr. Hughes' deposition in the Burkitt case found at page 281 commencing with the word "Mr. Young" and continuing over through

the end of the first paragraph on page 283. That has to do——

Mr. King: Wait a minute. I have already put in part of it. I have already got in the record——

Mr. Young: The deposition I am speaking of is the deposition—I am sorry, it is the transcript of the Burkitt case. I misstated that. It is not the deposition; it is the transcript in the Burkitt case.

Mr. King: Well, I object to that transcript [103] in the Burkitt case.

Mr. Young: I am only asking that it be done to save the necessity of putting Mr. Hughes on the witness stand to testify to the same facts that appear there.

Mr. King: I will have to examine it. He had me over in the deposition. Now, I will have to look at it.

The Court: 281, to what portion, Mr. Young?

Mr. Young: Commencing with the name “Mr. Young”.

Mr. King: I think Mr. Hughes should be called as a witness in this case.

The Court: How many pages of testimony?

Mr. King: Well, I want to see what it is, if I may.

Mr. Young: That has to do with the question as to what was an inducement for men to stay on with the Penney Company.

Mr. King: Where does it end?

Mr. Young: It begins on page 281 and ends on page 283.

Mr. King: We have no objection to that.

The Court: It may be admitted.

Mr. King: For the sake of saving time; that is all.

TESTIMONY OF MR. HUGHES

Mr. Young: Q. To what extent in relation to other possible factors did you consider that the plan itself was an inducement for men to stay on?

A. Of course, we did not consider that that would be the determining factor in a man because there are so many other reasons why men came into the Penney Company and why men have stayed with the Penney Company when we had no retirement plan whatever, and I could go on at great length on that.

Q. Would you just briefly indicate to the Court what factors in your observation caused men to continue in the employ of the company apart from the question of the plan.

A. Well, the first thing I think—I think I made this statement many times to investment men—the mainspring of the Penney Company throughout the years has been profit-sharing. I think that attracts and holds men to the Penney Company, with that liberal profit-sharing which a man has in the store, the advantage a store manager or associate has in the store. That is probably the selfish motive, but it is the basis of our company's growth. Coupled with that is the opportunity for a man to have a large measure of responsibility, to paddle his own canoe, because as a manager of a Penney store, while he cannot control everything, he does have a

(Testimony of Mr. Hughes)

larger measure of freedom than even an average independent retail merchant. He has that because he has no worries about finances in the Penney Company. He does not have to worry [104-A] about being out of a job and of being able to pay his bills. He has it because of the assistance given by a big corps of trained buyers, assistance given by skilled men, assistance of a skilled sales department, of a real advertising department, real estate department, and all the others. A man has an opportunity to grow and go places. When Mr. Penney hired Mr. Sams, he said, "You can go as far as your own rope will take you, as far as your rope, you can have all of the rope you want." This was the policy of the Penney Company. That is very attractive to a man who is ambitious and wants to go places. He has an opportunity to go. There is another factor which I prize very highly, and I think many, many men in the Penney Company prize, and that is the fact that we feel that to be an associate of Penney Company is almost a badge of honor. That may sound like baloney, but the standards this company has set and the pride we have in it is certainly an inducement to a man to stay with the company. There are provisions like liberal sick leave, paid vacations, free death benefits, group insurance, and all those things, but to me the real inducement to a man to come with the Penney Company or to continue with the Penney Company was the first ones I enumerated, liberal profit-sharing, the opportunity to be on his own, to do a job on his own with

a minimum of supervision, and the opportunity to go just as far as his ability will take him. [104B]

Mr. Young: Call Mr. Talbot.

JOHN C. TALBOT

a witness produced in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Mr. Young: If the Court please, this witness was called in the Burkitt case, and if there is no objection, I might just briefly state some of the preliminary matters without having to ask the questions.

Mr. King: I am not going to combine the two records in this case. You have insisted all along that they be kept separate; forget about it. I will proceed.

Mr. King: I will try to.

Direct Examination

Q. (By Mr. Young): State your name, please.

A. John C. Talbot.

Q. Where do you live?

A. St. Louis, Missouri.

Q. What is your present occupation?

A. Special Assistant to the Chancellor of Washington University.

Q. What was your occupation prior to that?

A. I was with the J. C. Penney Company.

Q. How long were you with the J. C. Penney Company?

A. From June of 1929 until late July of 1947.

(Testimony of John C. Talbot.)

Q. In what capacity were you with that company?

A. I was head of the Shoe Department that supplied shoe [105] requirements of all the stores.

Q. Were you a participant under the retirement plan which is the subject matter of this litigation?

A. Yes, sir.

Q. During what period of time were you such a participant?

A. I started at the beginning in 1940.

Q. You remained a participant until you left the company?

A. Yes, sir.

Q. Is that correct?

A. Yes.

Q. At what age did you leave the company?

A. In my 56th year, sir.

Q. Mr. Talbot, have you ever authorized Mr. Wells, one of the plaintiffs in this case, to bring this action on your behalf?

A. No, sir.

Q. Have you ever authorized Mr. Albertsen to bring this action on your behalf?

A. No, sir.

Q. Have you ever authorized the King law firm to bring this action on your behalf?

A. No, sir.

Q. Do you consider that since they are taking the position that they represent past participants that they have any authority to represent you?

A. Definitely not, sir. [106]

Q. Do you want them to represent you in this case?

A. I do not, sir.

Mr. Young: You may cross examine.

(Testimony of John C. Talbot.)

Cross Examination

Q. (By Mr. King): Mr. Talbot, if it should be determined as a result of this action that, as shown in Exhibit 332, you would become entitled to approximately 1692 shares, do you now disclaim any right to receive those shares?

A. Absolutely and completely, yes.

Mr. King: That is all.

Mr. Young: That is all.

ORA ESTLE CAMPBELL

a witness produced in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Young): Mr. Campbell, where do you live? A. Greenfield, Indiana.

Q. What is your occupation? A. Farmer.

Q. How long have you been a farmer?

A. 1948.

Q. Prior to the time that you became a farmer, what was your occupation?

A. Connected with the J. C. Penney Company.

Q. When did you first come with the Penney Company? A. May 1, 1921.

Q. When did you leave the Penney Company?

A. December 31, 1947.

Q. At the time you left the company, the Penney Company, were you a manager?

A. I was, sir.

Q. Where? A. Indianapolis, Indiana.

(Testimony of Ora Estle Campbell.)

Q. How long had you been in managerial capacity prior to the time you left the company? [108]

A. From 1924 until 1947.

Q. Were you a participant under the Penney retirement plan? A. I was, sir.

Q. At what age did you leave the company?

A. 55.

Q. Mr. Campbell, have you ever authorized Mr. Wells, one of the plaintiffs in this case, to bring this action on your behalf? A. I have not.

Q. Have you ever authorized Mr. Albertsen, one of the plaintiffs in this case, to bring this action on your behalf? A. I have not.

Q. Have you ever authorized the law firm of King, et cetera, to represent you in this case?

A. Definitely not.

Q. The plaintiffs in this case contend that they represent all past participants, and because of that circumstance do you recognize them having any authority to represent you? A. They do not.

Mr. King: I will object to that question as argumentative.

The Court: Objection overruled.

Mr. Young: Q. Do you want them to represent you in this case? A. I do not.

Mr. Young: That is all. [109]

Cross Examination

Q. (By Mr. King): Mr. Campbell, at the time you left the Penney Company did you have any shares of stock in the company?

(Testimony of Albert W. Hughes.)

Mr. King: Just a minute, please. And that it is improper for this witness to attempt to vary the terms of the plan by oral testimony.

Mr. Young: If the Court please, there is no attempt being made to vary the terms of this plan by oral testimony.

This is a situation in which the charge is being made that this plan was a lottery. The lottery is said to inhere in the fact that a person who received stock would have to be a person who lives to the age of sixty and was still a central or branch office executive or a manager. One of the factors involved in the question as to whether it is a lottery is what was the purpose of the provision itself. If the provision [112] was put in there as a sound matter of business judgment for the purpose of establishing a particular retirement plan for protection of the participants in the plan and to foster the interests of the company and the participants, that is a circumstance in respect of which the Court should be advised. I am offering this witness in respect to that subject matter.

The Court: Mr. Young, as I read the pre-trial order and particularly your contentions, you deny that the documents are ambiguous in any way. No testimony has been adduced by the plaintiffs to show any ambiguity. You have always contended that the documents speak for themselves, and I just do not understand the relevancy of any extrinsic evidence in view of your former contentions.

Mr. Young: Counsel's objection to this testimony

(Testimony of Albert W. Hughes.)

was predicated upon the assumption that we attempted to vary the terms of the plan. That is not true. I am simply indicating to the Court that this was a plan which was set up on the basis of a sound business judgment, and that by reason of this circumstance it does not have any inherent characteristics of a lottery, which is the charge made.

The Court: Cannot one determine that from an examination of the documents themselves?

Mr. Young: I think it can be determined from that, but it seems to me that we should have the right to offer oral testimony to supplement the documents. [113]

The Court: Is it your contention that that which may be a lottery under certain circumstances is not a lottery if it was done in good faith for a valid business purpose?

Mr. Young: That is a factor; yes, your Honor.

The Court: Do you have any authority to support you on that?

Mr. Young: We have a great deal of authority to support us on that.

The Court: I might say that over a period of time I have belonged to that school of legal thinking that believes that what is good business practice should be good business law except in unusual circumstances, and I am therefore going to overrule the objections and permit the witness to testify provisionally, at least. I am going to listen to the evidence, but I would like to have some authority presented to substantiate my legal thinking.

(Testimony of Albert W. Hughes.)

Mr. Young: If the Court please, that is a matter which will appear in our briefs. Unfortunately, we have been under such terrific pressure in connection with these cases the briefs are not ready to be submitted to your Honor, but in the time agreed upon yesterday, there will be ample authority submitted to support that contention.

The Court: Mr. King?

Mr. King: Of course, I can see the contention, but the contention was never included in this pre-trial order and it [114] takes us by surprise here that they are making that contention. There was never anything advanced in the pre-trial order along this line, nothing in the contentions of law nor in the contentions of fact, and I understood that when you made and prepared a pre-trial order, that plaintiffs were entitled to rely on it. Now they come in here with a new contention that we do not know anything about, and if Mr. Young will point out to me where that contention is in the pre-trial order, why, that would help out in the situation.

Mr. Young: I call the Court's attention to defendants' contention of law number one.

The Court: What page?

Mr. Stone: Page 77.

Mr. King: That does not notify us of any such contention he is now making.

Mr. Young: "Defendants contend that the Plan and Trust Agreement with respect to the 200,000 shares of J. C. Penney Company stock are valid

(Testimony of Albert W. Hughes.)

under the laws of the State of New York in all respects.”

The Court: That does not cover that.

Mr. Young: Some of the cases which will be cited are New York cases, your Honor.

The Court: In any event, I am going to listen to the testimony because, as I announced at the beginning of the Burkitt case, in view of the fact that I have not had an opportunity [115] to study the authorities upon which both parties will rely, I have to depend upon the attorneys to make their own case, and that is what I am going to do.

Mr. King: I have no objection to that, your Honor, but in view of your Honor’s statement, might I conclude the objection that it is immaterial under any issues of fact or law in the present action, so that that may be a part of the objection?

The Court: Yes.

Mr. King: And may the objection go to the whole line without repeating the objection?

The Court. Yes.

Mr. Young: Q. Would you read that last question?

(Previous question read: “Do you know the reason why there was included in the profit-sharing retirement plan the provisions for stock being issued to participants who lived on to retirement age?”)

Q. What was your answer to that question?

Mr. King: He did not answer?

(Testimony of Albert W. Hughes.)

Mr. Young: Q. What is your answer to the question? I mean, do you know the answer?

The Witness: Yes, to answer that question, Mr. Young, if your Honor will permit, I will have to cover a little more ground than that.

The Court: Go right ahead.

Mr. Young: Very well, proceed. [116]

The Witness: The board of directors of the Penney Company in having this plan prepared or sharing in its preparation and in adopting it, had two distinct features in mind, maybe more than that, but these two features.

One was the monetary credits and their investment, and the second was the stock that was to go only to participants upon qualifying for retirement.

We had spent a lot of time in trying to develop a plan that we felt was desirable for our organization. We had studied a great many plans and had spent—some of us had been particularly interested in them for a period of two or three years.

Plans at that time fell into two general classes. There were many different types, but plans fell into two general classes. One was the so-called insurance plan or the trust plan where the securities were all put in government securities. The funds of the trust were all put in government securities. Now, this type of plan had the assurance of protection and of careful conservation of principal. On the other hand, it had very little chance of enhancement in case of an inflation. It was a good guard against deflation.

(Testimony of Albert W. Hughes.)

The second type of plan that we found was the plan where a company or a trust fund invested the funds in common stock commonly of the company itself, in some cases common stocks as a group. We did not feel that that sort of a plan was desirable because we had seen in the experience of the forties plan after [117] plan of that sort go to smash.

Therefore, in trying to find a plan—we considered both of these types of plans, and neither one seemed to us desirable and sound for our company; therefore, we developed this plan which has two different features as one plan that would be suitable for the Penney Company.

We did that in this way. We said that all the funds that came into the plan would be invested in government securities. That was up until 1948 when we changed to a deferred annuity plan. This meant that we were trying, as far as humanly possible, to see that any funds to the credit of a participant in the plan would be paid a hundred cents on the dollar regardless of conditions.

Then we included two hundred thousand shares in the plan because we felt that in a period of inflation if we went into it there would be probably an enhancement in the value of these 200,000 shares, and, furthermore, in a period of inflation there would probably be increased earnings, and, therefore, increased dividends. We were trying to guard our plan against either deflation and the bad effect on participants, or inflation with a bad effect on participants. It was a balanced plan as we called it.

(Testimony of Albert W. Hughes.)

We rejected the idea of an insurance plan. Although two or three of the directors were very much interested in it, we rejected it as a group, the board of directors, for one reason [118] among others because it would impose a fixed annual charge on the company, and in our company we do not like fixed annual charges. We try to have flexibility, if possible. The idea of a fixed annual charge to provide for retirement benefits runs counter to the whole philosophy of our company, which works this way, what a man gets depends on the results he obtains.

Therefore, in this plan we made the company's contributions dependent upon the profits that the company made annually. Also with the 200,000 shares of stock in the fund, it meant that the dividends upon that stock would be dependent upon the earnings of the company and on the consequent dividends.

There was another point that we had in mind in making the contributions dependent on the company's results. There was another point. We wanted the store managers in every store and wanted the men in the central offices to be interested in the company as a whole as much as an individual store. We had a very generous profit-sharing contract basis for managers. We wanted to have a manager in one store interested in the manager of another store, and we felt that by making company contributions dependent upon company profits, we would assure greater cooperation on the part of the man-

(Testimony of Albert W. Hughes.)

agers and also greater cooperation between the New York office and the management group and the managers of the New York office.

There was another factor in this situation. We were trying to help men underwrite the unknown future regardless of [119] what time or on what occasion or for what reason they left the Penney Company.

In 1937, 1938 and 1939, when we were studying plans, we found that the great majority of plans, at least a very large percentage of them, were intended to take awfully good care or take some measure of care of a man after he reached retirement age, but we found in those plans a disregard for the man who did not reach retirement age. In non-contributory plans, most of the men who were fired before they reached retirement age got nothing. In contributory plans, generally speaking—this is the pattern in 1939 and 40,—in contributory plans, the participant in most of them got nothing except his own personal contributions either with interest—with no interest or with interest at two or three per cent. I make that statement advisedly because we studied plan after plan.

We wanted to provide a generous retirement plan, and we felt we would, and we wanted to take care of the man who for some reason might have to leave the employment of the company before he reached retirement age; therefore, we provided in this plan a provision that a man separating from the company for any reason would get one hundred

(Testimony of Albert W. Hughes.)

cents on the dollar of all the credits to his account in the plan.

In that connection, if I may, I would like to borrow an exhibit——

Mr. King: If your Honor please, the question asked of [120] the witness is why they put stock in the plan. We are now getting a lecture on the whole subject. I object to it as immaterial, but if your Honor wants to hear it, it is all right with me.

The Witness: I am trying to lead up to that, and I said I would give considerable information.

The Court: Go ahead.

The Witness: I would like to ask for an exhibit which is Mr. Trown's presentation to the board of directors.

Mr. King: 123.

The Witness: If I may have a copy of it, there are two very short paragraphs I would like to read.

(Document presented to the witness.)

The Witness: In this Exhibit 123, the third part of it—this was the proposal that was presented to the board of directors by Mr. Trown—in the third part of it there is a section called “Explanatory Matter.” In Section 10(b) of it, the pages are not numbered, there are two short sentences which I would like to read—three sentences.

It says, “Any participant leaving the employ of the company, on other than an approved leave, for any cause whatsoever other than approved retirement, must withdraw from the Fund. Withdrawal

(Testimony of Albert W. Hughes.)

of a deceased participant's account is also provided."

Now, these are the next two sentences:

"Such a separated employee would receive in cash (unless electing to accept an annuity which privilege is extended) [121] everything that he or she would receive if retiring at the date of separation except shares of stock."

Now, here is the real crux of what I want to refer to:

"This provision may be contended as being over liberal, but has been purposely included as an extension of the principle of ownership participation which has always operated in the company."

Mr. Trown included that, and I use it only as a verification of our experience and observation that most plans did not permit the participant that sort of a generous set-up that in any case whether a man was fired for dishonesty or whether he separated for some other reason, he got a hundred per cent of what was to his credit.

Now, I come to the last point, and that is the point to which I was leading up to.

We had set up a plan that we thought was very liberal. It had an unusual provision in it that I have just mentioned, and then we added to that the privilege of a man getting stock when he qualified for retirement. We did that, first, because we wanted to emphasize his interest, again, in the company as a whole in order that he would do his best to enhance the value of that stock if he qualified for re-

(Testimony of Albert W. Hughes.)

tirement. Second, we had observed as a result of our experience that quite a number of managers, if they had become or got in a comfortable position, in other words, they were in a store that was going along pretty [122] well and they were receiving a good compensation, that those men had a tendency to let down as they got older in point of service. We called it the "middle age sag." We had a regular term for it.

We did not set up this privilege of getting stock on later retirement as an inducement to a man to stay with the Penney Company. We did not have to induce men to stay with the Penney Company. We set this up as an extra incentive so that men would not sag back but would set new goals rather than staying just where they were. We felt that this stock was not intended as payment for long service. That did not enter into our consideration because we knew that under the liberal contract of profit-sharing the managers and other people had, certainly they were well rewarded for long service.

We did not set it up as a provision for a sick man or in case of death because our sick benefit, our liberal profit-sharing, our group insurance, took care of those provisions. We set it up as an incentive so that a man would strive constantly, particularly as he approached retirement age, to lift higher, hoping to increase his earnings, and, therefore, increasing the contribution to the retirement fund and the annuity in the stock he might get at the end of it.

(Testimony of Albert W. Hughes.)

Now, lastly, and I always like to hear the preacher say that, too, lastly we deferred the question of a man getting stock until he reached retirement age because of our very [123] unfortunate experience with Penney stock in the past.

Men who had received classified stock and then had converted that stock into Penney common and men who had the privilege of buying expansion stock had not held that stock. For various reasons they had gotten rid of it. In 1925 every share of Penney stock was owned by people in the Penney Company. In 1929 the stock went on the board. By 1940 over 53 per cent of the Penney stock had passed out of the hands of men who had the opportunity to buy it and was in the hands of outsiders.

This sort of practice defeated two of the main purposes the company had in mind in its original ownership of the stock because it did not preserve an interest in the company in whole, and it did not provide security and a nest-egg for their later years.

I can sum the whole thing up in about one sentence, which I probably should have done at the start, that the purpose of this plan, insofar as it pertained to the stock provision, was in the best judgment of the board of directors to the interest of the Penney Company and all, every possible or prospective participant. I apologize for the length of my answer, your Honor.

The Court: That is all right.

Mr. Young: That is all.

The Court: I think this is a good time to take

(Testimony of Albert W. Hughes.)

a recess because I want to ask a question or two.

As I understand it, Mr. King is making a contention that the 200,000 shares of Penney stock originally sold to the trustee was paid for by the original participants, and I also recall that you, Mr. Young, took violent exception to the statement of Mr. King. I believe your whole case, or much of it, is predicated upon the ability to prove payment of stock by the original participants, is that right?

Mr. King: Yes, you have it right, your Honor, except that I say it was paid for by their money or by funds borrowed by the trustee at their financial risk.

The Court: Yes, I know that. Perhaps when we come back this afternoon, a question could be asked Mr. Hughes to explain how the stock was paid for. Could you do that, Mr. Young?

Mr. Young: Yes, I was going to say that I have no further testimony in the case, and I would prefer, your Honor, to stay here a little longer at this time, if you wish.

The Court: Is this the end of your case?

Mr. Young: Just a moment, please.

(Discussion off the record between counsel.)

Mr. King: I think, your Honor, if we are not going to adjourn until twelve, he might want to wind it up, but I would want to cross examine a little bit.

Mr. Young: We will come back after recess then.

The Court: In view of the fact that there is only

a very little testimony to be put in, would you want to come back a [125] little earlier?

Mr. Young: One-thirty.

The Court: One-thirty, or do you want to wait until two?

Mr. King. One-forty-five would be all right. I eat a little more than Mr. Young. He has always been thin, but I think I could get here at one-forty-five.

The Court: We will recess until two o'clock.

Is it your contention, Mr. Young, that you do not need any testimony to prove the point that it was not money that belonged to the participants?

Mr. Young: That is right, your Honor.

The Court: Does the record so show?

Mr. Young: The record so shows, according to our views, exactly so.

The Court: I did not realize that. I thought perhaps you wanted some testimony.

Mr. Young: We will come back at two o'clock.

(Noon recess taken.) [126]

Afternoon Session

Court reconvened, pursuant to recess, at 2:00 P.M.

ALBERT W. HUGHES

a witness in behalf of Defendants, resumed the stand and was further examined and testified as follows:

Mr. Young: The plaintiff may cross-examine.

(Testimony of Albert W. Hughes.)

Cross Examination

Q. (By Mr. King): Mr. Hughes, I understood from your testimony this morning that you at least had spent a long period of time in consideration of a possible profit-sharing retirement plan for the Management staff of the Penney Company?

A. That is correct.

Q. And I believe you stated that you had reviewed plan after plan in consideration of your proposed plan for the Penney Company?

A. That is correct.

Q. Can you name to me a single plan that has any provision in it similar to the one that is in this profit-sharing plan that is involved in this action with respect to the awarding of stock to participants in the plan? A. No, sir; I cannot. [127]

Q. When you referred, Mr. Hughes, to a contributory plan, you meant a plan where the participants made contributions; is that correct?

A. Yes, sir.

Q. Can you name a single contributory plan in which a person who failed to continue in the employment up to retirement age got nothing if he withdrew?

A. I didn't make that statement as to the contributory plan.

Q. Would you tell me what you meant to say with respect to contributory plans?

A. Yes, sir. I think because I spoke so lengthily you probably are confusing two things. I said in non-contributory plans many participants got noth-

(Testimony of Albert W. Hughes.)

ing if they left before the retirement age. In contributory plans, in some of them they got their money back, and in others they got their money back with 2 or 3 per cent, and that was all.

Q. I see. You don't know of any contributory plan where they did not get back their contributions, at least, or their contributions plus some additional amount? A. No, I do not, sir.

Q. Now, Mr. Hughes, you remember the provisions of the Plan with respect to the purchase of stock by the Trustee? A. Yes, sir.

Q. As you stated, I believe, in your deposition, the Trustee bought the stock that it got? [128]

A. Yes, sir.

Q. Now it bought the stock and it pledged the stock as collateral for a loan from the Continental Illinois National Bank and Trust Company; is that right?

A. The Trustee pledged the stock as collateral for the loan; yes, sir.

Q. Suppose that the stock had dropped right after that loan was made, and suppose the stock had dropped, we will say, to \$50 a share, and the Continental Illinois National Bank and Trust Company had foreclosed on it. What would become of the contributions of the participants that were used to pay part of that loan?

Mr. Young: That is objected to as academic, and on the ground it does not appear that the stock ever went down. It was always up.

(Testimony of Albert W. Hughes.)

Mr. King: It didn't go down. I am asking a hypothetical question.

The Court: Objection overruled.

Mr. King: Thank you.

A. That note was a three-year note. It provided that all funds received by the Trustee should be used for repayment of that note. In Mr. Trown's projections in a document which I think you have in front of you——

Q. Exhibit 123.

A. Yes, sir—there are tables showing that the participants' [129] contributions would run anywhere from \$1,900,000 to two and a half million—I am using approximate figures—and that the dividends on the stock at the rate it had been earning for the last four or five years would run around a million dollars a year. And the company had made a profit every year of its existence except one year, in 1920. Therefore, it is a common-sense conclusion that if the stock had gone contrary there would still have been no reason for the bank to foreclose.

Q. J. C. Penney Company assumed no liability with respect to the payment of that note, did it?

A. I don't think it did, sir, except that the company could not curtail or change the contribution until the note was paid. That is in the Trust Agreement, I think you will find.

Q. But aside from those provisions in the Trust Agreement you have referred to, the company assumed no liability with respect to the payment of

(Testimony of Albert W. Hughes.)

the note due the Continental Illinois National Bank and Trust Company?

A. No, sir. It was a transaction between the Trustee and the Continental Bank. Perhaps I should ask for a chance to check that bank loan before I let those answers stand. I would like a chance to do that, if you have a copy of that that I may see.

The Court: I suggest that Mr. Stone answer that. Do you know the provisions of the Trust Agreement or the provisions [130] as to the loan?

Mr. Stone: Yes, sir. I have in my hand the loan agreement and the note. Those are Exhibits 210 and 211. In the loan agreement:

“Penney agrees that no amendment or change shall be made in the terms or provisions of said Agreement of Trust or Plan, which directly or indirectly may affect any of the rights or benefits of the Bank in, to or in connection with the ‘Fund,’ provided for in said Agreement of Trust, or which may directly or indirectly operate, then or in the future, to reduce the amount of such ‘Fund,’ without in each case the consent in writing of the Bank; provided, however, that the Bank shall, upon request of Penney, consent to an amendment or amendments of the Plan, which operates solely to reduce the annual contributions, required to be made from time to time by participants in the Plan, to an amount not less than 25 per cent of such participants’ annual compensation, as defined in the Plan.”

Then follows this paragraph:

“Further, Penney hereby agrees with the Bank

(Testimony of Albert W. Hughes.)

that, so long as said note evidencing said original loan shall be unpaid in whole or in part or there [131] shall be any other outstanding and unpaid indebtedness of the Trustee to the Bank, Penney will, annually and promptly, make the contributions, provided to be made by it under the Plan as now in force, in cash at or before the times, in the manner and in the amounts so provided in said Plan, and that Penney further will not reduce the amount of its contributions, provided to be made by it under the Plan as now in force, below the amounts which are required to be contributed by it, from time to time, under the Plan as now in force, and that Penney further will not discontinue making the contributions, provided for under Section 6(a) of the Plan as now in force, regardless of the amount of the 'Reserve for Retirement Account' and will not exercise any rights, granted to it under Section 15 of the Plan as now in force, to decrease or dispense with any Company contribution called for under the Plan as now in force or to substitute any form of stock or securities for cash contributions."

Then, just to complete the paragraph:

"The Trustee, however, shall have no right or power and shall be under no duty to enforce [132] this covenant of Penney."

Your Honor, this is Exhibit 210, the Loan Agreement, which is an agreement made by and between Continental Illinois National Bank and Trust Company of Chicago and The Chase National Bank of the City of New York and J. C. Penney Company.

(Testimony of Albert W. Hughes.)

The Court: In other words, J. C. Penney Company did not guarantee the payment of the loan, or did not execute a hold-harmless agreement, an indemnity agreement, but did agree that it would pay the amount specified in the Plan, and that amount was an amount equal to 2 per cent of the total wages paid to the employees; is that correct?

Mr. Stone: Yes, sir; 2 per cent of salaries of participants, eligible participants, in the Plan.

The Court: That was a definite amount it was required to pay, and all the rest of the payments were predicated on a profit being made by the company.

Mr. Stone: Yes, sir.

The Court: And by the individual managers.

Mr. Stone: I think that is correct, sir, including, of course, dividends on the stock which could also be used to repay the loan.

The Court: Yes, but that was predicated on the company making a profit.

Mr. Stone: Yes, sir. I just wanted to bring that out. [133]

The Witness: Your Honor, may I make a statement?

The Court: Go ahead.

The Witness: Dividends are not always involved in profit.

The Court: It might have been past profit?

The Witness: That is right; might have been surplus. The Penney Company for many years had ample surplus where it could have carried dividends.

The Court: It had an unbroken dividend record from its inception except for one year?

(Testimony of Albert W. Hughes.)

The Witness: It had an unbroken dividend record. Its profit record—in 1920 it lost, and that is the only year since it started. But it did have an unbroken dividend record; yes, sir.

The Court: Go ahead, Mr. King.

Q. (By Mr. King): Now, Mr. Hughes, as I understood your statement in answer to a question asked you this morning, you considered that this stock was to be held for people who could continue on with the company until reaching retirement status?

A. I don't think I said that, Mr. King.

Q. Tell us what you said, then. I will admit it was rather a long answer and I didn't get all of it.

A. I don't blame you. I said that it was an extra incentive for men who qualified for retirement. [134]

Q. In my question didn't I ask that? I said it was to be held for men who reached retirement status. Isn't that the same thing?

A. That is not what you asked me. Pardon me, sir. You asked me if it was for men who stayed with the Penney Company long enough, and there is quite a difference, I think. Maybe I am making a difference without a distinction.

Q. I will reframe the question.

Mr. Young: Complete your explanation, if you wish to.

A. My explanation is it was something intended for a man——

Q. (By Mr. King): A little louder, Mr. Hughes.

A. My explanation of the difference I make is

(Testimony of Albert W. Hughes.)

that your question sounded to me as though it was something which was intended for a man who hung on indefinitely. That was not the reason for the Plan. The reason for the Plan was for a man who performed well. That is what was stated in the introduction of the Plan. It was a Plan for men who performed well and who reached retirement status.

Q. And the Company would be the judge as to whether they performed well?

A. I don't know who else could be.

Q. I take it your answer to my last question would be Yes? A. Yes, sir.

Q. Now, Mr. Hughes, the shares of stock held by the Trustee were intended to be for those men who continued on in the [135] employ of the company and performed well until they reached what I referred to as retirement status and what you referred to as retirement age. Is that correct?

A. I would accept either term, sir.

Q. What is your answer?

A. I would say Yes to your question.

Q. What?

A. I would say Yes to your question.

Q. Assuming that there was a man by the name of Trumbull—I haven't seen that name mentioned, but assume there is a man named Trumbull, and that he was a very fine manager, and that he had trained, say, at least a dozen managers, and he continued on and performed well with the company until he was 59 years old and 360 days, whereupon he

(Testimony of Albert W. Hughes.)

was struck by an automobile and killed. Would he be entitled to any of that stock?

A. He would not, sir.

Q. Suppose that he performed well with the company until he was 59 years and six months old, whereupon he made a mistake in the administration of the store, and you thought it was a very serious mistake and you discharged him. Would he be entitled to any of the stock?

A. I would like to say more than two words on that. My answer would be that it would have to be a very serious mistake, of immorality or dishonesty, and in that case I don't [136] think he would be entitled to it. If it was a mistake of poor operation or merely a mistake in judgment, the company would have held him on.

Q. Let me reframe my question. Supposing that this Mr. Trumbull continued in the employ of the company from the inception of the Plan until he was 59 years and six months old, and then something happened which in your opinion warranted his discharge and you did discharge him at that time. Would he have been entitled to receive any stock under the Plan?

A. He would not.

Q. Suppose that the same Mr. Trumbull had been with the company and worked well and hard, and he suffered a heart attack when he was 59 years and six months old, so that he could not continue with his work. Would he be entitled to any stock under the Plan?

A. He would get it under the process that our

(Testimony of Albert W. Hughes.)

company has followed, because such a man would have been fully protected for six months or a year, or even a year and a half, under our sick leave and under extensions of it. That happened in repeated cases.

The Court: But he would not be entitled to retirement as a matter of right?

A. Not at all. He would have been entitled to it because he qualified for retirement status or retirement age, whichever [137] way you want to put it.

Q. (By Mr. King): Let me reframe my question. Suppose this man Trumbull had worked hard and had been in the Plan from the beginning, and worked well and industriously up until the time he was 59 years and six months old, and he suffered a heart attack and for some reason he was not continued on sick leave up until age 60. Would he have been entitled to any of the stock under the Plan?

A. That, I think, is a question that is hypothetical and impossible to answer, because there has been no circumstance in our years of operation of the Plan where we have taken care of such a man.

The Court: I think the witness has already stated in answer to my question that he would not be entitled to it as a matter of right.

Mr. King: That is what I mean. I am trying to bring out that if they didn't continue them on under sick leave until they were 60——

The Court: You don't have to ask any more questions on that. I agree with you.

(Testimony of Albert W. Hughes.)

Mr. King: All right. As long as that is understood.

Q. Now these managers, Mr. Hughes, the Plan provided that they didn't have any right to continue in their job; isn't that true?

A. That is correct. [138]

Q. And the company had the right, with or without cause, to discharge any manager at any time, did it not?

A. Technically that is correct. The Penney Company does not discharge men without cause.

Q. I am asking you whether they had the right to do so?

A. I said technically that is correct, they have that right.

Mr. King: No further questions.

Mr. Young: That is all, Mr. Hughes.

The Court: I notice that no one is willing to take my suggestion to find out from Mr. Hughes, if he is the proper man to discuss the matter or to give testimony, on whether or not the company paid the \$5,700,000, or ultimately the \$6,000,000 that went to pay for the stock, or whether the participants paid for it.

Mr. King: That is covered in the excerpts from the depositions, your Honor. I didn't read them in, but that is in there, and has already been covered by Mr. Hughes and others, I think Mr. Weiderman, that the Trustee paid for the stock and the company sold it, and the moneys that came in to the fund

(Testimony of Albert W. Hughes.)

from the contributions of these participants were used to pay off that loan.

The Court: The testimony is not only the funds contributed by the participants but the money contributed by the company also went in to pay the loan. [139]

Mr. King: Yes.

The Court: Of the funds held by the Trustee.

Mr. King: That is right, yes. And we have this legal proposition to be developed in our brief: That the minute these people, I mean the participants as a group, serving we will say through the year 1940, having made contributions there, the amount paid by them as a group became their money. The minute it was paid over to the Trustee it was their fund and no longer the funds of the company. That is the proposition I mentioned once earlier in the case. So that the contributions, what we will call received from the participants, plus the additional contributions of the company, both under the terms of the Plan went to pay for this stock.

The Court: I think I know your theory. Let me hear from Mr. Stone or Mr. Young or Mr. Pell. What is your theory of how this money was paid by the company, the six million dollars.

Mr. Stone: Your Honor, I will try to explain and make it clear.

The Court: What exhibit are you reading from?

Mr. Stone: I am looking at the moment at Exhibit 125, which is the original black booklet. I think in the outline it is made very clear. I am looking at

(Testimony of Albert W. Hughes.)

Page 4. I might say—I know you want me to explain something and not comment particularly on what Mr. King has said, but I would just like [140] to say, without any discourtesy, it seems to me he just disregards completely every term and condition of the Plan in order to arrive at his theory. Everything that was done was done precisely in accordance with the Plan and Trust Agreement as approved and accepted by the participants. But he has just set it aside and therefore arrived at some other theory.

I think the outline on Page 4, sir, possibly if we read it together, on the purchase of the Penney Company stock, the Penney Company agrees—I will summarize the thing, if I may——

Mr. King: Where are you summarizing?

Mr. Stone: From the outline of the Plan.

Mr. King: There are four headings on Page 4. Which one are you summarizing?

Mr. Stone: I started at the top of the page, under “Purchase of J. C. Penney Company stock.”

Mr. King: Yes.

Mr. Stone: Because I think that this tells the running story clearly.

The Court: Now, J. C. Penney Company sold to the Trustee 200,000 shares of stock at a price which was the book price or a price around book price?

Mr. Stone: Yes, sir.

The Court: Which was \$30.00. [141]

Mr. Stone: \$30.00.

The Court: Whereas the market value of that stock was around \$80.00.

(Testimony of Albert W. Hughes.)

Mr. Stone: \$80.00, sir. It was \$30.00 and reduced by two dividends that had been paid before the issuance of the stock on August 1, so that the price was \$28.50, and was subsequently increased by \$300,000 to make a full \$6,000,000.

The Court: That was as a result of a suit filed by a stockholder?

Mr. Stone: There had been a complaint. No merit was recognized in it, but in the course of settlement an adjustment was made and the \$300,000 additional brought it up to \$6,000,000. But the \$5,700,000 was the beginning of it.

Then under that, "J. C. Penney Company Contributions": The company will contribute two things to the Fund. First, two per cent of each year's salary paid to all of the eligible employes—I am paraphrasing a little—and, second, six per cent of any company net profit in excess of 15 per cent of the book value of the company for the year.

The note says that "All dividends on the 200,000 shares of stock purchased will, of course, accrue to the Fund." Of course, that is——

The Court: That is held by the Trustee. I follow you up to there.

Mr. Stone: Then the next thing is just that all assets [142] and receipts under the Plan become a part of the Trust Fund to be held by a bank or trust company as trustee in accordance with the terms of the Plan.

The next one deals with the disposition of the Fund receipts. The first one relates to the contribu-

(Testimony of Albert W. Hughes.)

tions of participants, and provides that a separate account will be kept for each participant to which will be credited the participant's contributions——

The Court: Yes, I understand your theory without your having to go through that. Let me just make a statement and see if I am right.

Mr. Stone: Surely.

The Court: It is your statement that the contributions made by the individual participants were always credited to the accounts of those individual participants?

Mr. Stone: Absolutely.

The Court: And that, therefore, ultimately, by the contributions of the company of the 6 per cent of profits and 2 per cent of the wages that the original \$6,000,000 was paid by the company. Is that your theory?

Mr. Stone: With just a little variation, sir. All the moneys that came in, participants' contributions and everything, went over to pay the \$5,700,000 to cover the stock of the Trustee. At the same time every participant had his own contributions credited to his account, and if he left the [143] company he took 100 per cent of those contributions with him along with any other credits. The use of his money, the use of the contributions that came in from participants—let's put it that way—that went into the Trust Fund and then went over to the loan did not affect in any way the participant receiving the full amount of his contributions when he left, because he

(Testimony of Albert W. Hughes.)

was credited with the full amount and would always be sure to get 100 per cent of his credits.

Then the 2-per cent contribution plus the dividends, the earliest dividends, went to cover the 50,000-share block, the cost of that block, the 2-per cent contribution continuing to cover the balance of it.

There are two separate steps, and I think that is where the confusion arises. This repayment of the loan to the bank from receipts that come into the Trust Fund, which don't have any identity—once they get into the Trust Fund they go in to pay off the loan and the stock comes back. But the important question is whether the loan was paid off or not, if a man went out before the loan was paid off, as some men did, they would nevertheless receive 100 per cent of their contributions, because there was always a reserve kept to pay them. That could not affect them. They were always paid in full. Trust Fund moneys were being used and each participant received 100 per cent of what he was [144] entitled to.

The Court: You don't contend that the company paid the \$6,000,000? You contend it was paid out of all of the funds received by the Trustee?

Mr. Stone: Absolutely, sir, which consisted of the sources from which funds were used to pay off the loan, participants' contributions, company contributions, dividends, and all of those things.

The Court: I was in error. Mr. Young and Mr. King had an argument in my chambers one day on

(Testimony of Albert W. Hughes.)

one of the pre-trial hearings, and Mr. Young denied a statement made by Mr. King, and I thought that at the same time he asserted that the \$6,000,000 was paid by the company.

Mr. Young: No, your Honor.

Mr. Stone: Paid by the Trust Fund, sir.

The Court: Out of funds received by the company?

Mr. Stone: Yes. In the Trust Agreement it specifically says, "Inasmuch as it is hereinafter provided"—I am reading from Page 39 now of this booklet—"that moneys received by the Trustee from dividends, and from the company's and participants' contributions under the Plan shall be paid to the Bank on account of payment of interest and principal of such loan," and so forth, and then in a subsequent part of it it says specifically that all those moneys coming in shall be applied to the repayment of the loan. [145]

The idea was to clear up the loan in as short a time as possible for the benefit of all participants, get the stock back, and have no further interest to pay. And in the meanwhile any participant was fully protected. He couldn't lose anything.

Mr. King: What page are you reading from?

Mr. Stone: I was reading that from Page 39.

Mr. King: Page 39.

Mr. Stone: It is Article Fourth. I started to read from the third paragraph.

Mr. King: Yes, that is right.

Mr. Stone: May I call your Honor's attention

(Testimony of Albert W. Hughes.)

to just one more provision, even more specifically, in the Trust Agreement, on the matter of the use of the funds to pay off the loan. That is on Page 40, where it reads, "Subparagraph D:

"Anything in the Plan or this Agreement of Trust to the contrary notwithstanding, except as hereafter provided in subparagraph E of this Article, the Trustee shall apply all cash dividends, received by it on the shares of J. C. Penney Company stock above referred to, as well as all other moneys received by it from J. C. Penney Company or from participants in the Plan, from time to time when and as received by it as [146] follows:"

In the next paragraph, which I will not read, there is a right to reserve certain moneys.

The next paragraph:

"Second, any balance of such moneys, so received by the Trustee and not so reserved, shall be paid to said Bank, to be credited first on any then matured and unpaid interest and then on any unpaid principal of any such indebtedness of the Trustee to the Bank, regardless, in any case, of whether or not such principal shall then be due."

In other words, the Trust Agreement and the Plan contain, as we understand it, everything precisely in accordance with the terms——

The Court: Do you agree with Mr. King's contention that the contributions made by the company of an amount equal to 2 per cent of the salaries of the managerial staff, plus 6 per cent of the profits over 15 per cent of the book value, con-

(Testimony of Albert W. Hughes.)

stituted a portion of the earnings of the managerial staff and belonged to them as a matter of right as of the close of any fiscal year?

Mr. Stone: I certainly do not, and I really cannot understand the contention. When a company sets up a plan, and agrees to contribute to a trust under it, and those moneys are held subject to the trust, those moneys do not belong to [147] the individual participants, by any means. Companies just would not set up plans or conditions if that followed.

The Court: Although it was part of the inducement for employes to continue with the company and work for the company?

Mr. Stone: To have a plan of this sort? But of course, sir. I agree. And many other inducements. The profits of the company from which it makes its contributions are produced by all the employes of the company working together. Of course, the management group produced a good bit, but the Penney Company at times employs, I believe, as many as 50,000 people.

The Court: Mr. King, is it your contention that in all of these pension plans set up by various companies, in which the company is required to pay into the fund a percentage of the profits, that the money so contributed belong to the employes?

Mr. King: After they complete each year of service in accordance with the provisions of the Plan, then those moneys become the average earnings of the employes of the group, and this Plan

(Testimony of Albert W. Hughes.)

says in so many words that after that contribution had been made and had been paid to the Trustee the company no longer had any interest in it.

The Court: Yes, but that doesn't mean that any individual has a right to withdraw any particular amount out of the Plan [148] except in accordance with the provisions of the Plan. I think that is Mr. Stone's position.

Mr. Stone: Yes, that is exactly it.

Mr. Pell: Your Honor, under the terms of the Plan nobody could withdraw anything until he separated from the company. And certainly, on Mr. King's point, the Department of Internal Revenue recognized that until a man leaves the company these funds are not his property. Otherwise he would have to pay an income tax on the company's profits which are contributed every year. And that is not the case.

Mr. King: Well, I just wanted to say, your Honor, that Mr. Stone says there was an account where these contributions were credited to these individuals. But until this stock was paid for they might have had an account, but they didn't have any money to pay it out, because under the provisions of Paragraph 40-a, Page 28-b, of the Pre-Trial Order, it shows that, for instance, the employees on August 1, 1940, contributed \$1,575,000, and on the close of business that day, after paying one and one-half million on this note, the Trustee had in its hands only \$75,000, although on these

(Testimony of Albert W. Hughes.)

accounts there must have been credited \$1,575,000.

So it shows where the money went.

Now, I want to point out that that Paragraph 40-a shows that as fast as these moneys came in they went to pay off that loan. And they can say all they want to about them [149] crediting them. If the whole thing had folded up as early as December 21, 1941, there wouldn't have been anything in there for these people to get their money back. You can say all you want to about them getting it back and having an account with the credit there. There wasn't any funds there to pay them.

The Court: Yes, but there was stock there.

Mr. King: That is the point. We contend that that is just the point. The stock was there, and these people who paid for it were the beneficiaries of that stock. And it doesn't lie in equity and in justice for this company to contend that they can withhold the stock from these people when somebody else bought it.

The Court: Supposing that instead of buying Penney stock they bought U.S. Government Bonds?

Mr. King: It would be the same thing. The mere fact it is Penney stock—I asked Mr. Hughes this question, because I made a study of that: I asked him to point to a single plan where a company sold a trustee something and then when they tried to withdraw the people that paid for it couldn't get it. That is the reason I asked him that question. He examined plan after plan and he didn't find any plan like that.

(Testimony of Albert W. Hughes.)

The Court: I am not too impressed about your statement that there was only \$75,000 in the account. When you deposit [150] \$75,000 in a bank and there is, perhaps, \$100,000,000 in the bank, they don't keep all that money in cash. They buy securities with it. Even though you have credit for the full amount, obviously it could not be paid if everyone asked for it at the same time.

Mr. King: I wasn't making the point for that purpose, your Honor. I was merely pointing it out to show that the contributions of the participants went to acquire stock. Suppose they had enough money in the Trustee's hands over and above these contributions to equal these credits. But they didn't have. Furthermore, in Exhibit 208-D, I think it is—wait a minute. It is 222-D—Mr. McAlpine wrote in and wanted to know why he didn't get more money than he got. And they very frankly told him that his money had been used to pay for this stock, and therefore it hadn't earned anything. It says that right here in 222-D. He wrote in and he says—in 222-C he says to Mr. Trown: "Your fine letter of September 4th received. I have a statement here which says 'Annual Statement of Account for Year Ending December 31, 1940,' and so forth. Now, please explain to me what this amount of money has earned in the eight months of 1941 and where do I come in on that?"

Mr. Trown writes back: "I am indeed sorry, but it appears to fall to me to give you disappointing information. The amount of the check which you

(Testimony of Albert W. Hughes.)

received represents [151] the full amount due you from the Fund. This results from the fact that the Fund to this point has had no moneys for outside investment. In the early stages of the Plan all moneys have had to be used to cover the purchase price of the 200,000 shares of J. C. Penney Company stock which was purchased by the Fund. Further, until the purchase price of the 50,000-share block is covered, all dividends received are applied to that cost. Further, the excess profit contribution by the company is an annual matter and does not apply to prior part-year participation. All this adds up to the fact that to this time no credit other than reflected in the check submitted is available. This is all covered in the Plan booklet, which I realize may be difficult to understand."

The Court: I don't see how that conflicts with anything.

Mr. Stone: No, we agree with everything stated in the letter and stand upon it.

Your Honor, there is one fact I would like to throw in, talking about the amount of reserve on hand. In the year 1940 four men withdrew. The total aggregate amounts withdrawn amounted to \$3,436. There was always an adequate reserve. That was Exhibit 292 I was quoting from.

The Court: Mr. King, I think that in order to sustain your position you not only have to establish that this Plan was a lottery, but don't you also have to establish the [152] severability of the par-

(Testimony of Albert W. Hughes.)

ticular money contributed in the first two years from all other provisions of the Plan itself?

Mr. King: That is right, your Honor. We think that the law is adequate that where a trust is set up and one phase of it is illegal it is severable. That is our theory in this case.

The Court: All right. Mr. Hughes, you have been sitting here on the stand all this time. Did you want to ask Mr. Hughes any questions?

Mr. Young: I have no further questions.

The Court: That is all.

(Witness excused.)

Mr. Young: If the Court please, that concludes the testimony on behalf of defendants. At this time I would like to take up a matter which was referred to this morning in order to clarify it. Your Honor raised the question as to whether or not it was proper to consider the fact that a plan is set up for a valid business purpose negatives the matter of a lottery, and the question arose as to whether or not we would be at liberty to introduce testimony of Mr. Hughes in that respect.

I wanted at this time to call your attention to the fifth Contention of Law made by the plaintiffs, where they say: [153]

“Plaintiffs contend that the trust purported to be created with respect to the 200,000 shares of stock was in effect a lottery, and against the public policy of the State of New York, and void.”

Defendants deny plaintiffs' Contention of Law

No. 5. It is our position that in the light of a contention of that sort which is devised by us, under the denial we would have the right to show any circumstances indicating that the Plan and Trust Agreement were created to serve a valid business purpose.

I am not prepared at this time to go into a lengthy dissertation on the law on that subject, except that for the purpose of the suggestion I am about to make I want to call your Honor's attention to one paragraph in 12 American Jurisprudence, 744, which reads as follows:—

The Court: Just a moment. Don't put this in the record.

(Statement by the Court off the record.)

Mr. Young: In that situation I am going to state Young on law, your Honor.

The Court: All right.

Mr. Young: Because I am asserting at this time that we will be able to establish by cases, as [154] distinguished from these not-so-good treatises, Corpus Juris and American Jurisprudence, this proposition: That it is in order for the Court to consider all testimony surrounding the circumstances under which a contract is entered into when a charge is made that the contract is illegal or void.

The Court: You don't have to go to American Jurisprudence for that. You have got Oregon and California cases directly in point.

Mr. Young: Surely, except I didn't have a great deal of time during the noon hour to get anywhere on the subject. I just want to state this proposition.

Now in that situation, your Honor, it is our position that the present state of the contentions permits us to show that matter to the Court.

I pause a moment to see whether your Honor has any view otherwise upon that subject; because if there is any view otherwise upon the subject, I think that this is the time when we should be allowed to have the opportunity to make any addition that might be necessary to prevent any manifest injustice.

The Court: Read that again, that Young on Jurisprudence.

Mr. Young: Young on Jurisprudence, your Honor, or, rather Young adopts this principle: That there is a presumption in favor of the legality of an agreement, and although an agreement is illegal, if the illegality does not appear on [155] its face it must be proved by the person who asserts it. The rule is established that where a written instrument is attacked upon the ground that the agreement is offensive to law and violative of public policy the whole transaction should be inquired into, and the Court will not expect itself to be embarrassed by any technical rules regarding the admissibility of evidence.

With due regard to your Honor's comments upon the source of that authority, including the speaker, it is our position that the contention is adequate to cover this point. However, this is an important piece of litigation, and if there is any question whatever in the mind of the Court as to whether or not evidence upon that subject is to be considered——

The Court: Oh, I will consider the evidence.

Mr. Young: Very well. That settles it. I was going to make a suggestion——

The Court: Is there any ruling from the income tax division of the State of New York or the Attorney-General of the State of New York with reference to the validity of this Plan?

Mr. Pell: No.

Mr. Young: It has never been presented.

The Court: How about the State income tax? What happened there? [156]

Mr. Stone: May I inquire of the Secretary in charge of taxes? We are more familiar with the Federal income taxes.

Mr. Pell: The important thing is Section 165 of the Federal Act, which we do get.

The Court: Yes, but the contention here is being made that under the laws of the State of New York this is a lottery and illegal. I was merely inquiring to find out whether there was already introduced in evidence an opinion of the Attorney-General of the State of New York or an action of an administrative body in the State of New York which is charged with the responsibility of administering the income tax laws.

Mr. Stone: Mr. Raskopf, the Secretary of the company, informs me there is no necessity to qualify this Plan under the provisions of any New York income tax law, and therefore there would be no ruling. As your Honor is aware, in Paragraph 64 of the Pre-Trial Order is set forth the rulings received from the United States Treasury Depart-

ment qualifying this Plan as an exact plan. Mr. Raskopf also mentioned that California does require such a qualification. The Penney Company pays taxes in many states, and all the papers were sent to California and the tax deduction is allowed there.

The Court: That is not in the record. I will repeat: I will consider the testimony of Mr. Hughes with reference to his intentions, at least. [157]

Now, Mr. King, do you have any rebuttal testimony?

Mr. King: No, the plaintiff rests.

Mr. Young: In that situation, your Honor, the defendants now make a motion which I think your Honor may regard as surplusage, but to the end that the record is clear upon the subject as to our position, we move that the cause be dismissed for the reasons that were assigned at the time that we made the original motion at the commencement of this trial.

The Court: All right. I don't think there is any action that I have to take on that motion.

We have already determined a time schedule for briefs.

Mr. King: It is in the record. I didn't take it down, but I know it is in the transcript.

The Court: Then the case is submitted. This case as well as the Burkitt case is submitted.

Mr. King: Yes, your Honor. Do you want any oral argument on it? I would presume not.

The Court: I will let both you and Mr. Young determine the procedure in this case. If you think

The Court: Oh, I will consider the evidence.

Mr. Young: Very well. That settles it. I was going to make a suggestion——

The Court: Is there any ruling from the income tax division of the State of New York or the Attorney-General of the State of New York with reference to the validity of this Plan?

Mr. Pell: No.

Mr. Young: It has never been presented.

The Court: How about the State income tax? What happened there? [156]

Mr. Stone: May I inquire of the Secretary in charge of taxes? We are more familiar with the Federal income taxes.

Mr. Pell: The important thing is Section 165 of the Federal Act, which we do get.

The Court: Yes, but the contention here is being made that under the laws of the State of New York this is a lottery and illegal. I was merely inquiring to find out whether there was already introduced in evidence an opinion of the Attorney-General of the State of New York or an action of an administrative body in the State of New York which is charged with the responsibility of administering the income tax laws.

Mr. Stone: Mr. Raskopf, the Secretary of the company, informs me there is no necessity to qualify this Plan under the provisions of any New York income tax law, and therefore there would be no ruling. As your Honor is aware, in Paragraph 64 of the Pre-Trial Order is set forth the rulings received from the United States Treasury Depart-

ment qualifying this Plan as an exact plan. Mr. Raskopf also mentioned that California does require such a qualification. The Penney Company pays taxes in many states, and all the papers were sent to California and the tax deduction is allowed there.

The Court: That is not in the record. I will repeat: I will consider the testimony of Mr. Hughes with reference to his intentions, at least. [157]

Now, Mr. King, do you have any rebuttal testimony?

Mr. King: No, the plaintiff rests.

Mr. Young: In that situation, your Honor, the defendants now make a motion which I think your Honor may regard as surplusage, but to the end that the record is clear upon the subject as to our position, we move that the cause be dismissed for the reasons that were assigned at the time that we made the original motion at the commencement of this trial.

The Court: All right. I don't think there is any action that I have to take on that motion.

We have already determined a time schedule for briefs.

Mr. King: It is in the record. I didn't take it down, but I know it is in the transcript.

The Court: Then the case is submitted. This case as well as the Burkitt case is submitted.

Mr. King: Yes, your Honor. Do you want any oral argument on it? I would presume not.

The Court: I will let both you and Mr. Young determine the procedure in this case. If you think

that it is advisable to have an oral argument, I have no objection to oral argument.

Mr. King: I didn't know. I just wanted to [158] be clear.

Your Honor didn't make any indication the other day whether you wanted it or not. I didn't know.

(Whereupon proceedings in the above case were concluded.)

[Endorsed]: Filed February 2, 1955.

[Endorsed]: No. 15125. United States Court of Appeals for the Ninth Circuit. Harvey L. Wells and Harry J. Albertsen, on behalf of themselves, and others similarly situated, Appellants, vs. J. C. Penney Company, a corporation, and The Chase Manhattan Bank, a corporation, successor in interest to the Chase National Bank of the City of New York, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: May 10, 1956.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 15125

HARVEY L. WELLS and HARRY J. ALBERT-
SEN, on behalf of themselves and others sim-
ilarly situated, Appellants,

vs.

J. C. PENNEY COMPANY, a corporation, and
THE CHASE MANHATTAN BANK, a cor-
poration (substituted for The Chase National
Bank of the City of New York),
Appellees.

STATEMENT OF POINTS

Pursuant to Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellants hereby make the following statements of points on which they intend to rely on this appeal:

1. The district court erred in failing to find that the J. C. Penney Company profit-sharing retirement plan (for J. C. Penney Company management staff) and the agreement of trust provide benefits contingent on the lives of participants contrary to New York law.

2. The district court erred in finding that the retirement plan was not unfair, discriminatory or illegal because older employees, among them some members of the company's board of directors, who

were among the first to qualify for retirement with stock, received a greater number of shares than younger and future employees will receive when they retire. This error is contained in the district court's finding of fact No. 46 and conclusion of law No. 13.

3. The district court erred in finding that the retirement plan, so far as it pertains to the shares of capital stock of J. C. Penney Company, is not a wagering contract, lottery or tontine contract and does not violate the New York Constitution, statutes, laws and public policy prohibiting such contracts and schemes. This error is contained in the district court's findings of fact No. 47 and 48 and conclusions of law No. 5, 6, 7, 8 and 10.

4. The district court erred in admitting in evidence, over the objections of appellants, the testimony of Albert W. Hughes consisting of extrinsic evidence concerning the meaning of the retirement plan and trust.

5. The district court erred in failing to find that the trust purported to be established under the retirement plan, so far as it pertains to the shares of capital stock of J. C. Penney Company, was and is illegal and void and of no effect and in failing to adjudge and decree that the Trustee holds the shares of stock of J. C. Penney Company under a resulting trust in favor of appellants and those for whom appellants prosecute this action. This error is contained in the district court's conclusions of law No. 17, 18, 20 and 21.

6. The district court erred in finding that the stock portion of the retirement plan is unseverable from the remaining portions of the plan. This error is contained in the district court's findings of fact No. 43 and 44 and conclusion of law No. 9.

7. The district court erred in finding that it would be highly inequitable to permit appellants to recover in this proceeding on their own behalf and on behalf of the class for which they are suing. This error is contained in the district court's finding of fact No. 58 and conclusion of law No. 19.

8. The district court erred in failing to award appellants compensation for the reasonable value of the services of their attorneys in the prosecution of this action and for their costs and disbursements incurred herein, and in failing to decree that the sum so awarded should constitute a lien upon the shares of stock found by the court to have been acquired by the contributions and earnings of appellants and those for whom they prosecuted this action.

/s/ KING, MILLER, ANDERSON,
NASH & YERKE

/s/ RALPH H. KING

/s/ FREDRIC A. YERKE, JR.

/s/ PAUL R. MEYER

Attorneys for Appellants

Acknowledgment of Service Attached.

[Endorsed]: Filed May 10, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Pursuant to Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, Appellant hereby designates the following portions of the record on appeal as material to the consideration of this appeal:

1. Complaint, including Exhibit X and Exhibit A thereto.

2. Answer of defendant The Chase National Bank of the City of New York.

3. Answer of defendant J. C. Penney Company, excluding Exhibits A, B, C, D and E thereto.

4. The complete Pre-Trial Order, except the portions set forth in subdivisions (a), (b) and (c) below:

(a) Agreed facts numbered 27b, 27c, 41, 42, 43, 47, 48, 54, 55, 56, 79 and 81;

(b) Pre-Trial Order segregated as to Issue of Jurisdiction (pages 92 through 98);

(c) Index to Pre-Trial Exhibits (pages 99 through 122).

5. Transcript of proceedings.

6. Order transmitting original exhibits.

7. Opinion of Judge Gus J. Solomon dated December 29, 1955.

8. Order of substitution.

9. Findings of fact and conclusions of law.

10. Final judgment.

11. Notice of appeal.
12. Bond on appeal.
13. Designation of contents of record on appeal.
14. Statement of points.
15. This designation of record.

/s/ KING, MILLER, ANDERSON,
NASH & YERKE;

/s/ RALPH H. KING,
/s/ FREDRIC A. YERKE, JR.,

/s/ PAUL R. MEYER,
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 10, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

COUNTER DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

Appellants having heretofore on May 9, 1956 served upon Appellees and filed with this Court their designation of certain portions of the record on appeal as material to the consideration of said appeal, Appellees hereby designate the following additional parts of the record which they deem to be material:

1. Portions of the Pre-Trial Order set forth below:

Agreed facts numbered 27 B., 27 C., 41, 42, 43, 55, 56 and 81.

2. This counter-designation of additional portions of record.

Appellees reserve the right to refer to and rely upon such of the exhibits in this case, on file with the Clerk of this Court, as Appellees deem to be material to the consideration of this appeal.

/s/ KOERNER, YOUNG,
 McCOLLOCH & DEZENDORE;
/s/ CLARENCE J. YOUNG,
/s/ WAYNE HILLIARD,
 Attorneys for Appellees.

/s/ W. H. DANNAT PELL,
/s/ HENRY STONE,
 Attorneys for Appellees.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 16, 1956. Paul P. O'Brien,
Clerk.